Supreme Court, U.S.
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RECORD NO.

In the

Supreme Court of the United States

October Term, 2004

ALBERT L. FREEMAN,

Petitioner,

– v. –

DUKE POWER COMPANY,
A division of Duke Energy Corporation; Duke Energy Corporation,

Respondents.

ALBERT L. FREEMAN,

Petitioner,

– v. –

CINDY THAXTON and GEORGE KWASCHA,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In July of 1999, after having twice unsuccessfully attempted to terminate the employment of Petitioner Albert L. Freeman for "moonlighting" Respondent Duke Power terminated Mr. Freeman's employment for allegedly breaching a "no-moonlighting" agreement between Freeman and Duke Power. Respondents Thaxton and Kwascha orchestrated and recommended the discharge of the Petitioner Freeman. Freeman brought two separate actions in North Carolina state court. The Respondents removed the cases to U.S. District Court.

The U.S. District Court dismissed both of Petitioner Freeman's state law actions, one against Duke Power Company and one against Cindy Thaxton and George Kwascha, on the bases that all of the state law claims raised in the two cases were either preempted by *§301* of the Labor Management Relations Act (LMRA) and failed to state claims under the LMRA, or, if not preempted, failed to state a claim under state law. The U.S. Court of Appeals for the Fourth Circuit affirmed. The following questions are presented:

1. Did the Fourth Circuit err in holding, in conflict with the decisions of this Court, that the Freeman Agreements were not independent of the collective bargaining agreement and, therefore, were preempted by §301 of the Labor Management Relations Act?

2. Did the Freeman Agreements constitute "last chance agreements" and, thus, "contracts" under §301 of the LMRA?

3. Did the Fourth Circuit err in holding, in conflict with its own decisions and decisions of this Court, that Freeman's claim for tortious interference with contract was both preempted by §301, LMRA, and, simultaneously, failed to state a valid §301 claim?

4. Did the Fourth Circuit err in holding that its decision in *Int'l Union, United Mine Workers of Am. v. Covenant Coal Corp., 977 F.2d 895, 899 (4th Cir. 1992)*, simultaneously preempted and barred a state law tort claim for tortious interference with contract?

5. Did the Fourth Circuit err, in departing form the accepted course of judicial proceedings, by overlooking the material legal matter that the Petitioner-Appellant's state law claim for interference with contract stated a claim upon which relief can be granted?

6. Did the Fourth Circuit err, in departing form the accepted course of judicial proceedings, by overlooking the material legal matter that the Petitioner-Appellant's state law claim for unfair and deceptive trade practices stated a claim upon which relief can be granted?

PARTIES TO THE PROCEEDING

The parties to these proceedings are set forth in the case captions. Petitioner Freeman was the Petitioner-Appellant in both cases below. Respondents were Respondents-Appellees in their respective case below.

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INTRODUCTION

In July of 1999, after having twice unsuccessfully attempted to terminate the employment of Petitioner Albert L. Freeman for "moonlighting", Respondent Duke Power terminated Mr. Freeman's employment for allegedly breaching a "no-moonlighting" agreement between Freeman and Duke Power. Respondents Thaxton and Kwascha orchestrated and recommended the discharge of the Petitioner Freeman.

Petitioner Freeman brought an action in North Carolina state court against Duke Power. Petitioner Freeman brought a separate state court action against Thaxton and Kwascha. Respondents in both cases removed the cases to the U.S. District Court. The U.S. District Court dismissed both of Petitioner Freeman's state law actions on the bases that all of the state law claims raised in the two cases were either preempted by *§301* of the Labor Management Relations Act (LMRA) and failed to state claims under the LMRA, or, if not preempted, failed to state a claim under state law. The U.S. Court of Appeals for the Fourth Circuit affirmed.

DECISIONS BELOW

The decision of the United States Court of Appeals for the Fourth Circuit in these consolidated cases is an unpublished opinion. *Albert L. Freeman v. Duke Power, et al., 03-2146, CA 00-665-1 (4 Cir., September 27, 2004); Albert L. Freeman v. Cindy Thaxton, George Kwasha, 03-2147, CA-02-630-1 (4 Cir., September 27, 2004).* The decision of the United States Court of Appeals for the Fourth Circuit denying the Petition for Rehearing and Rehearing En Banc is unreported. *Albert L. Freeman v. Duke Power, et al., 03-2146, CA 00-665-1 (4 Cir., October 26, 2004); Albert L. Freeman v. Cindy Thaxton, George Kwasha, 03-2147, CA-02-630-1 (4 Cir., October 26, 2004).* The decision of the U.S. District Court in these

consolidated cases is unreported. *Albert L. Freeman v. Duke Power, et al., 1:00CV00665 (MDNC, August 15, 2003); Albert L. Freeman v. Cindy Thaxton, George Kwasha, 1:02CV00630 (MDNC, August 15, 2003).*

JURISDICTION

The United States Court of Appeals for the Fourth Circuit entered its judgment in the consolidated cases on September 27, 2004. The Court of Appeals denied Mr. Freeman's petition for rehearing and rehearing en banc on October 26, 2004. Petitioner now files this Petition for Writ of Certiorari. This Court has jurisdiction under *28 U.S.C. §1254(1).*

STATEMENT OF THE CASE

Petitioner Freeman filed the first underlying action on June 30, 2000, in the General Court of Justice, Superior Court Division, Alamance County, North Carolina. Petitioner Freeman alleged several causes of action against Duke Power, including breach of contract, wrongful discharge, a violation fo the N.C. Constitution, and bad faith discharge.

Petitioner Freeman filed the second underlying action on June 28, 2002, in the General Court of Justice, Superior Court Division, Alamance County, North Carolina. Petitioner Freeman alleged several causes of action against Cindy Thaxton and George Kwascha, including interference with contract and unfair deceptive trade practices.

The Respondents in both actions filed notices of removal to the U.S. District Court. The U.S. District Court found that jurisdiction was proper pursuant to §301 of the Labor Management Reporting Act.

A. Facts

No. 03-2146 (Action against Duke Power)

The Petitioner-Appellant Freeman was first employed by Duke Power in June, 1983, as a Transmission Line helper (Jt. App., p. 9). Approximately eighteen (18) months later, Petitioner-Appellant Freeman transferred to the Burlington operations and assumed the duties of Distribution Line Technician C, i.e., a lineman. Freeman's duties as a Distribution Line Technician included, but were not limited to, the installation of utility poles, troubleshooting interference and after-hour problems, electrical work at transformer boxes on utility poles, the connection of power lines at customers' meter boxes, and lead man over a Duke Power line truck (Jt. App., p. 9). As a Distribution Line Technician, Freeman had minimal contact with the owner's property, i.e., hooking cable from the utility pole to the meter box on the owner's property. As a lineman for Duke Power, Freeman worked the power distribution lines, drove the Duke Power truck, and was paid an initial hourly rate of $7.25 an hour (Jt. App., p. 9-10).

Petitioner-Appellant Freeman is married and now has two (2) children. In 1984, Freeman obtained a limited electrical contractor's license which allowed him to do electrical wiring jobs where the contract amount was less than $25,000.00. Thereafter, Freeman "moonlighted" as an electrician to support his family (Jt. App., p. 10). As an electrician during his off-duty time, Freeman did small electrical wiring jobs, such as installing light fixtures, ceiling fans, telephone jacks, etc. This electrical work was performed primarily in residences and, occasionally, in small businesses. Upon information and belief, other Duke Power employees also "moonlighted" and some of these employees "moonlighted" as electricians. At all relevant times hereto, Duke Power had no policies proscribing "moonlighting" and had negotiated no restrictions on "moonlighting" in the

Union Contract (Jt. App., p. 10).

During the period from 1984 to 1994, Duke Power was aware that Freeman "moonlighted" as an electrician and took no employment action against him (Jt. App., p. 10). In fact, on numerous occasions prior to 1994, Duke Power utilized Freeman's services as an electrician in the rewiring of Duke Power buildings. On occasion, Duke Power even relieved Freeman of his lineman duties so that Freeman could rewire Duke Power buildings during regular business hours. Duke Power acquiesced to, and ratified, Freeman's "moonlighting" (Jt. App., p. 10).

Petitioner-Appellant Freeman was a good employee and performed every aspect of his job satisfactorily at Duke Power. At all times relevant hereto, the Petitioner-Appellant observed and complied with the instructions and regulations of Duke Power and performed loyal and efficient work and service to Duke Power. Freeman's "moonlighting" did not adversely affect either his attendance or his work performance at Duke Power (Jt. App., pp. 10-11).

Duke Power is one of the largest public utilities in the nation whereas Albert Freeman is an individual who was trying to support his family. Freeman's off-duty work as an electrician in Alamance County did not even closely resemble the power distribution services provided by Duke Power to its customers in North and South Carolina. Freeman's "moonlighting" did not have, and could not have had, an adverse economic impact upon Duke Power (Jt. App., p. 11). Freeman's "moonlighting" posed no competitive threat, direct or indirect, to Duke Power. Freeman solicited no work away from Duke Power and did not cause Duke Power resources to be used to advance his "moonlighting." Freeman did not promote, or do, his electrical work during his normal Duke Power working hours, except when specifically requested to perform such services for Duke Power (Jt. App., p. 11).

However, in or about 1990, Duke Power transferred a

district manager, Ed Holt, to Burlington from Reidsville. Holt disliked "moonlighting" in general and Freeman's "moonlighting" in particular. On one occasion in 1993, Holt wrongly accused Freeman of "moonlighting" during his workday at Duke Power. The Petitioner-Appellant is informed and believes and, therefore, alleged that Duke Power, though its agents and employees, embarked upon a course of action to prevent his "moonlighting" and to deny to him and his family the enjoyment of the fruits of his own labor (Jt. App., p. 11).

On or about January 26, 1994, Freeman was suspended and then discharged from his employment as a lineman with Duke Power for allegedly "removing a service drop and meter and disconnecting service to a customer without authorization from Duke Power Company" (Jt. App., pp. 11-12). While "moonlighting" after hours, Freeman had disconnected the power to a customer's residence and brought the meter box back to Duke Power. Local Union 962, IBEW, filed a grievance under the grievance provision of the Union Contract on behalf of Freeman. Prior to the referral of this grievance to arbitration as provided by the Union Contract, Duke Power and Local 962 settled the grievance and Duke Power "struck a bargain with" Freeman. As part of this settlement, Duke Power placed Freeman under a restrictive employment contract with Duke Power (Jt. App., p. 12).

In settlement of this grievance, Duke Power, Local 962, and Freeman entered into a Grievance Resolution (hereinafter "Agreement") on or about June 20, 1994 (Jt. App., p. 12). Under that Agreement, Duke Power agreed to reinstate Freeman to his position of Distribution Line Technician with no loss of service but with no back pay. The Parties further agreed that, should Freeman thereafter engage directly or indirectly in the business of electrical contracting while employed with Duke Power, Duke Power could terminate Freeman's employment for that reason (Jt. App., p. 12). *The Agreement further provided that Duke Power's decision to discharge Freeman for engaging*

in the business of electrical contracting "shall be final and shall not be subject to review under any grievance or arbitration provision under any Collective Bargaining Agreement in effect at the time of his discharge" (Jt. App., p. 12). The Agreement further provided that Freeman could continue to do small incidental wiring jobs for his close friends or relatives, provided he did not solicit, or advertise for, such work. The Agreement also provided that the resolution with Freeman would not be deemed precedent for similar situations with other employees (Jt. App., pp. 12-13). Upon information and belief, Freeman was singled out by Duke Power while similarly-situated employees were not disciplined for "moonlighting" as electricians or otherwise.

The Defendant-Appellee Duke Power, upon information and belief, drafted this Agreement for signature by the Petitioner-Appellant Freeman. Duke Power drafted the Agreement and the language of the Agreement should be construed strictly against Duke Power.

Petitioner-Appellant Freeman abided by the language of the Agreement, notwithstanding the fact that the Agreement purported to restrain his fundamental right to work and to engage in a lawful business. However, in June of 1996, Duke Power again suspended and proposed to discharge Freeman allegedly for engaging in the business of electrical contracting (Jt. App., p. 13). Duke Power claimed that Freeman had breached the Agreement of June, 1994, which Freeman denied.

In order to resolve this dispute, Duke Power and Freeman, who was represented by his attorney, agreed to an Amendment to the Grievance Resolution (hereinafter "Amended Agreement"), dated July 3, 1996 (Jt. App., pp. 13-14). The Amended Agreement provided that Freeman was prohibited from being or becoming employed on a full or part-time basis with any person, firm, or corporation engaging in the business of electrical contracting (Jt. App., p. 14). The "business of electrical contracting" was defined in the Amended Agreement

as "owning and operating a business for the purpose of profit by providing electrical contracting services." The Amended Agreement further provided that Freeman "will not take out any electrical permit or permit for the purpose of electrical wiring in his name under his electrical contractor's license except as necessary for Mr. Freeman to perform electrical work on property he owns" (Jt. App., p. 14). The Amended Agreement also provided that Freeman "may wire any property which he either individually or with his spouse owns, with the exception of any houses being built for resale" (Jt. App., p. 14).

The Respondent-Appellee Duke Power, upon information and belief, drafted the Amended Agreement which was executed by Freeman on or about July 3, 1996. Duke Power agreed not to terminate Freeman's employment for the alleged reason of engaging in the business of electrical contracting prior to July 3, 1996. In return, Freeman agreed not to engage, directly or indirectly, in the business of electrical contracting in the future. Notwithstanding the fact that Duke Power had authored the language of the earlier Agreement, Duke Power sought to make the language of the Amendment even more restrictive in 1996. Upon information and belief, Duke Power realized that the language of the Agreement was unclear and sought to "tighten the noose" around the Petitioner-Appellant and his means of supporting his family with the Amended Agreement (Jt. App., p. 14).

Freeman abided by, and complied with, the language of the Amended Agreement. Nonetheless, in July of 1999, after having twice unsuccessfully attempted to discharge Freeman for the same reason, the Respondent-Appellee Duke Power, through Respondents George Kwascha and Cindy Thaxton, suspended and then terminated Freeman's employment for allegedly breaching the Amended Agreement. Freeman denied that he had breached the language of the Amended Agreement (Jt. App., p. 15). Local 962 declined to file a grievance and referred Freeman to Duke Power.

Freeman made demand upon Duke Power to reinstate him to his job position with no loss in service. Duke Power refused to do so.

No. 03-2147 (Action against Thaxton and Kwascha)

Respondents-Appellees Thaxton and Kwascha, management employees with Duke Power, disliked Freeman, resented his large home in Elon College, the property holdings of Freeman and his spouse, and his affluent lifestyle, and harbored personal hostility and ill-will towards Freeman (Jt. App., p. 231).

In July of 1999, Respondents-Appellees Thaxton and Kwascha, without proper investigation and without a thorough review of the facts, suspended Freeman from his job duties, recommended his dismissal, and orchestrated the termination of Freeman's employment from Duke Power for allegedly "moonlighting" (Jt. App., p. 231).

Thaxton and Kwascha exceeded their authority, in order to prevent the continuation of Freeman's employment with Duke Power, by unfairly singling Freeman out due to his success and actively seeking a pretext to wrongfully discharge Freeman for the business activity of "moonlighting" (Jt. App., p. 231).

The acts and conduct of Thaxton and Kwascha were done outside the scope of their employment, in bad faith, for a wrongful purpose, with malice, without any legal justification, and for a reason not reasonably related to the protection of a legitimate business interest (Jt. App., p 232).

Respondents-Appellees' unfair and deceptive acts and conduct in causing the discharge of Freeman for alleged "moonlighting" affected commerce and were acts and practices "in or affecting commerce" and constitute unfair and deceptive trade practices, which are proscribed by Chapter 75-1.1 of the North Carolina General Statutes (Jt. App., p. 233).

B. Proceedings Below

Freeman brought an action in North Carolina state court against Duke Power, alleging breach of contract, wrongful discharge, violation of North Carolina's Constitution, and bad faith discharge. He brought a separate state court action against Cindy Thaxton and George Kwascha, his immediate supervisors, for interference with contract and violation of North Carolina's unfair and deceptive trade practices act. The Respondents in both cases removed the cases to U.S. District Court and filed motions to dismiss the cases for failure to state a claim. The Respondents also sought to consolidate the cases in the U.S. District Court. Petitioner Freeman resisted the motions and moved to remand the cases back to state court, to amend his complaint, to exclude evidence attached to the Respondents' motions to dismiss, and to conduct discovery.

1. The District Court.

The U.S. District Court denied Freeman's motion to remand the cases to state court because the court determined that the complaints in both cases raised issues arising under federal law, specifically the LMRA. The court determined that Freeman's claims against Duke Power for breach of contract and wrongful discharge were preempted by §301 of the LMRA and granted the Respondents' motions to dismiss. The District Court denied Freeman's motion to amend his complaint to allege that he was an at-will employee because the Court concluded that the allegation would not have changed the fact that the claim was preempted Section 301, LMRA. The District Court dismissed the bad faith discharge and state constitutional claims as failing to state claims cognizable under North Carolina law.

The District Court determined that Freeman's claim against the individual Respondents for interference with

contract was also preempted by the LMRA and subject to dismissal. It determined that, even if the unfair and deceptive trade practices claim was not preempted by the LMRA, such a claim was unavailable under North Carolina law in the employment setting. The District Court found that the Respondents' motions to consolidate and Freeman's motions to exclude evidence and conduct discovery were all mooted by the dismissals. Petitioner Freeman appealed.

2. The Court of Appeals.

The U.S. Court of Appeals affirmed the judgment of the U.S. District Court in both consolidated cases.

No. 03-2146 (Action against Duke Power)

In affirming, the U.S. Court of Appeals for the Fourth Circuit found that, although disputes arising over independent employment contracts unrelated to a CBA are not preempted by *§301* of the LMRA, *see Caterpillar Inc. v. Williams, 482 U.S. 386, 394-95 (1987)*, the Grievance Resolution and the Amendment at bar were not independent of the CBA. The Court of Appeals noted that the employees in *Caterpillar* had entered separate management contracts and only later became subject to a CBA when they were demoted. Their state law action was based on the management contracts, not anything derivative of the CBA, and thus was not preempted by the LMRA. *Id.* at 395 & n.9. The Court of Appeals than concluded that the same could not be said in the instant case, "as the Grievance Resolution and Amendment derive their 'entire vitality and legitimacy' from CBA," citing *Davis v. Bell Atlantic-West Virginia, Inc., 110 F.3d 245, 248 (4th Cir. 1997).*

No. 03-2147 (Action against Thaxton and Kwascha)

In affirming, the U.S. Court of Appeals observed that, Applying the most natural interpretation of this language, we [have previously held] that a suit against a non-signatory of a contract cannot be considered a suit for violation of the contract. *Int'l Union, United Mine Workers of Am. v. Covenant Coal Corp., 977 F.2d 895, 899 (4th Cir. 1992).* Bound, as both it and we are by prior controlling and unquestioned circuit precedent, the district court properly dismissed Freeman's claim against Thaxton and Kwascha for interference with contract. (Opinion, p. 12).

The Fourth Circuit further observed that,

> Although *N.C.G.S. §75-1.1(b)* defines "commerce" broadly as "business activities, however denominated," the Supreme Court of North Carolina has cautioned that the act "is not intended to apply to all wrongs in a business setting," including most employment disputes. *Dalton v. Camp, 548 S.E.2d 704, 711 (N.C. 2001),*(distinguishing Sara Lee on the basis that the employee in Sara Lee owed a fiduciary duty to his employer, and the employee was entrenched in a buyer-seller relationship with his employer, which fell squarely within the purview of the unfair trade practices act). Freeman's allegations that the Respondents caused Duke Power to terminate him fails to meet the requirement that the Respondents' acts be in or affecting commerce, *see Durling v. King 554 S.E.2d 1, 4-5 (N.C. Ct. App. 2001)* (affirming summary judgment where "no evidence was presented that the subject transactions had any impact beyond the parties' employment relationships"), and he therefore failed to state a claim under the state unfair and deceptive trade practices act. (Opinion, p. 13).

The U.S. Court of Appeals affirmed the district court's order denying Freeman's motions to remand and dismissing Freeman's complaints against Duke Power and against Thaxton and Kwascha. The U.S. Court of Appeals also affirmed the district court's denial of the various pending motions as the dismissal of all claims made the motions moot.

REASONS FOR GRANTING THE WRIT

No. 03-2146 (Action against Duke Power)

I. The U.S. Court of Appeals for the Fourth Circuit has decided an important federal question in a way that conflicts with relevant decisions of this Court, consideration by this Court is therefore necessary to secure and maintain uniformity of the Court's decisions, and this case presents questions of exceptional importance that have not been, but should be, resolved by this Court.

The Fourth Circuit's decision in the case at bar conflicts with a decision of the United States Supreme Court and this proceeding involves one or more questions of exceptional importance in labor law jurisdiction which should be resolved by this Court.

A. The Fourth Circuit's decision conflicts with the decision of the United States Supreme Court in *Caterpillar, Inc. v. Williams, 482 U.S. 386 (1987)*.

Employees covered by collective-bargaining agreements are entitled "to assert legal rights *independent* of that agreement, including state-law contract rights, so long as the contract relied upon is *not* a collective-bargaining agreement." *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 396, 107 S.Ct. 2425, 2431, 96 L.Ed.2d 318 (1987).

Citing *Caterpillar, Inc. v. Williams, supra,* the Fourth

Circuit conceded that disputes arising over independent employment contracts unrelated to a CBA are *not* preempted by Section 301 of the LMRA. (Opinion, p.6). However, the Fourth Circuit distinguished *Caterpillar* from the instant case (Opinion, p.7).

Private employment agreements may borrow terms from a collective-bargaining agreement without bringing the private agreement within the scope of Section 301 of the LMRA. *Marion v. Virginia Elec. & Power Co.*, 52 F.3d 86, 89 (4th Cir. 1995). This is especially so, where as here, the resolution of the claim did *not* depend on the meaning of, or require the interpretation of, a collective-bargaining agreement[1]. The Freeman Agreements do not implicate provisions of the collective-bargaining agreement nor is the subject matter of these Agreements (i.e., moonlighting) covered by the collective-bargaining agreement. The Freeman Agreements specifically provided that disputes would *not* be resolved under the grievance and arbitration provisions of the collective-bargaining agreement. Hence, *no* interpretation of the collective-bargaining agreement would necessarily be involved.

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[1] The Respondents-Appellees argued that *Davis v. Bell Atlantic-West Virginia, Inc.*, 110 F.3d 245, 248 (4th Cir. 1997) "implicitly" held that a grievance settlement agreement was a contract within the preview of Section 301 of the LMRA. *However, the complaint in that case specifically alleged a breach of the collective-bargaining agreement which clearly provided Section 301 pre-emption.* While the language of the *Davis* opinion concerning the settlement agreement appears to be *dicta*, an interpretation of the settlement agreement in *Davis* required reference to terms of the collective-bargaining agreement. Absenteeism and tardiness were covered terms under the collective bargaining agreement. *This is not* so *in the instant case.* As noted by the Respondents-Appellees, no relevant Fourth Circuit or Middle District precedent exists on "last chance" agreements as "contracts" under Section 301 of the LMRA.

The district court specifically noted that it found it unnecessary to consider the settlement agreements and the collective bargaining agreement in reaching its decision (Jt. App., p. 215). The Fourth Circuit affirmed the order of the district court without commenting on this anomaly. Section 301 of the LMRA provides a basis for federal jurisdiction because collective-bargaining agreements provide the alternative and exclusive remedy of arbitration. *See Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 211, 105 S.Ct. 1904, 1911, 85 L.Ed.2d 206 (1985).* As noted above, the Supreme Court in *Allis-Chalmers* emphasized that, "[W]e [do not] hold that every state-law suit asserting a right that relates in some way to a provision in a collective bargaining agreement, or more generally to the parties to such an agreement, necessarily is pre-empted by § 301." *Id.* at 1916. Moreover, the *Allis-Chalmers'* reliance on arbitration does not apply here. Under the private agreements, Mr. Freeman did not have access or recourse to the grievance and arbitration procedures of the collective-bargaining agreement. The collective-bargaining agreement in this case provided the Petitioner-Appellant with no remedy at all. "It would be anomalous to hold that Section 301 preempts his state remedies because federal law provides the exclusive remedy, only then to discover that Petitioner-Appellant had no remedies under federal law." *Scott v New United Motor Mfg., Inc.*, 632 F.Supp. 891, 894 (N.D.Cal. 1986).

The Fourth Circuit's decision conflicts with the decision of the United States Supreme Court in *Caterpillar, Inc. v. Williams, 482 U.S. 386 (1987).* This Court should grant review to resolve this conflict.

B. This case involves one or more questions of exceptional importance in labor law jurisprudence that has not been, but should be, settled by this Court.

Case No. 03-2146 raises the important question of whether or *not* the settlement agreements in the case at bar were "last chance agreements" as that term is used in labor law jurisprudence. No relevant Fourth Circuit precedent exists on "last chance agreements" as "contracts" under Section 301 of the LMRA. The Respondents-Appellees argued that the agreements in the instant case were "last chance agreements." (Respondents-Appellees Brief, pp. 15-19). In its Opinion, the Fourth Circuit relied upon *Davis v. Bell Atlantic-W.Va., Inc, 110 F.3d 245 (4th Cir. 1997),* wherein that Circuit construed a settlement agreement as a "rider to the CBA" (Opinion, p. 6). No Fourth Circuit law exists on the difference, if any, between a "rider" and a "last chance agreement" to a CBA. It is unclear as to whether or not the Fourth Circuit in the case at bar found the agreements at issue to be "riders" or " last chance agreements," or none of the above. This question is of exceptional importance in labor law jurisprudence. This Court should grant review to resolve this important question of federal law.

No. 03-2147 (Action against Thaxton and Kwascha)

II. The U.S. Court of Appeals for the Fourth Circuit has decided an important question of federal law that has not been, but should be, settled by this Court.

In the action against Thaxton and Kwascha, the U.S. Court of Appeals for the Fourth Circuit has decided an important question of §301, LMRA, preemption of state law tort claims involving claims against employees in their individual capacities. The Petition for Writ of Certiorari should be granted to resolve this question and to secure and

maintain the uniformity of the decisions of this Court.

A. The decision of the Fourth Circuit conflicts with that Court's decision in *Jackson v. Kimel, 922 F.2d 1318, 1327 (4 Cir 1993).*

The Opinion of the Fourth Circuit is in conflict with its decision in *Jackson v. Kimel, 922 F.2d 1318, 1327 (4th Cir. 1993),* and that conflict is *not* addressed in the Opinion.

The U.S. Court of Appeals for the Fourth Circuit, in *Jackson v. Kimel, 992 F.2d 1318, 1327 (4th Cir. 1993)*, held that a North Carolina tort claim against an individual supervisor was *not* properly removed to federal court. In *Jackson, supra,* the Court of Appeals reversed the judgment of the U.S. District Court that an intentional infliction of emotional distress claim against a supervisor in his individual capacity was preempted by § 301 of the LMRA. In finding *no* preemption, this Court of Appeals stated that,

> In this case, interpretation of the collective bargaining agreement is not necessary to determine whether Kimel owed a duty to refrain from the alleged conduct; the collective bargaining agreement could not authorize his alleged behavior.
>
> *Id.* at 1327.

In a concurring opinion in *Jackson*, Circuit Judge Phillips noted that, "None of the Supreme Court decisions establishing the contours of § 301 preemption of state law tort claims involved either original or removed claims against employees in their individual capacities." *Jackson* at 1328, fn.1. Circuit Judge Phillips further noted that,

> So far as I know, neither the Supreme Court nor we

> ever have held that a union employee's state-law tort claim against a fellow-employee that is removed pendent to a joined tort claim against the employer is subject, like the claim against the employer, to being 'recharacterized' by preemption as a § 301 claim and so made subject to federal defenses unique to such a claim.
>
> *Id.* at 1328.

Finding that such claims should *not* be subject to § 301 preemption, Judge Phillips warned that,

> *An almost scandalous consequence would be* that by that means a fellow-employee defendant to a meritorious state-law tort action would be enabled, following removal of the pendent claim against him, *to defeat it by invoking § 301 defenses (failure to exhaust grievance procedures, short limitations period) that are only available to one who properly can be charged as a signatory with breaching a labor contract.*
>
> *Id.* at 1328 (Emphasis added).

In the instant case, the Petitioner-Appellant's Verified Complaint was based on state law, was *not* inextricably intertwined with construction and application of the terms of the collective bargaining agreement, and involved purely factual questions concerning the conduct of the Petitioner-Appellant and the conduct and motivation of the individual Respondents. The Petitioner-Appellant's state law claims for interference with contract and unfair and deceptive trade practices were *not* pre-empted by the LMRA.

As Circuit Judge Phillips stated in *Jackson*, *supra,* "None of the Supreme Court decisions establishing the contours of § 301 preemption of state law tort claims involved either original or removed claims against employees *in their individual capacities*." *Jackson* at 1328, fn.1 (Emphasis added).

Mr. Freeman sued Thaxton and Kwascha as *individuals*. Neither were signatories to the agreements at issue in Case No. 03-2146, the action against Duke Power. Case No. 03-2147, the action against Thaxton and Kwascha, concerned the conduct and motivation of Thaxton and Kwascha and, thus, did *not* require or depend upon an interpretation of the CBA. Contrary to the Opinion of the Fourth Circuit, *no* interpretation of the extent of Thaxton and Kwascha's supervisory authority as defined in the CBA was required (Opinion, pp. 8-9). The "almost scandalous consequence" which Judge Phillips warned of in *Jackson v. Kimel, supra, at 1328,* resulted in Case No. 03-2147. This Court should grant review to resolve this conflict and to settle this important question of federal law.

B. An injust and harsh result arises from the decision of the Fourth Circuit because Mr. Freeman is left without remedy against Thaxton and Kwascha.

The Fourth Circuit overlooked the material legal matter that Mr. Freeman is left without a remedy against Thaxton and Kwascha as a result of the Fourth Circuit's decision. The decision works an injustice upon Mr. Freeman because the Fourth Circuit's decision bars a federal cause of action for tortious interference with an employment agreement against nonsignatories to that

agreement (i.e., Thaxton and Kwascha) and, simultaneously, preempts a similar cause of action premised upon state law.

On the one hand, the Fourth Circuit relied upon this Court's decision in *International Union, UMWA v. Convenant Coal, 977 F.2d 895 (4th Cir. 1992)*, in holding that Mr. Freeman's claim against Thaxton and Kwascha for tortious interference with contract was preempted by Section 301 of the LMRA (Opinion, p. 9). On the other hand, the Fourth Circuit relied upon the very same decision in *Covenant Coal Corp., supra,* to hold that the district court properly dismissed Freeman's claim against Thaxton and Kwascha for interference with contract (Opinion, p. 12).

The Fourth Circuit, in *International Union, UMWA v. Convenant Coal, 977 F.2d 895 (4th Cir. 1992),* observed that,

> We are cognizant of the apparent paradox, inherent in our decision of this case, holding that Section 301of the LMRA bars a federal cause of action for tortious interference with contract, yet simultaneously preempts the identical state law cause of action. This result is not as harsh as it would initially appear, however, because the Union is not left without remedy. . .Because an adequate forum exists for resolution of the Union's claims, we discern no injustice in the finding that section 301 of the LMRA serves both to bar a federal cause of action for tortious interference with a collective bargaining agreement against a non-signatory of that agreement, and to preempt a similar cause of action premised on state law.

Id. at 899-900.

In another case cited by the Fourth Circuit in its Opinion, *Kimbro v. Pepsico, Inc., 215 F.3d 723 (7th Cir. 2000)*, the Seventh Circuit of Court of Appeals also observed that,

> It is true that in a case in which the defendant is not a party to the contract, the extinction of state causes of action is questionable because it could leave the Petitioner-Appeallant remediless.

Id. at 727.

The Fourth Circuit's decision leaves Mr. Freeman without a remedy against Thaxton and Kwascha. This is a harsh and unjust result. This Court should grant review to resolve this conflict and to settle this important question of federal law.

C. The decision of the Fourth Circuit departed from the accepted course of judicial proceedings by overlooking the material legal matter that the Petitioner-Appellant's state law claim for interference with contract stated a claim upon which relief can be granted.

The Petitioner-Appellant's Complaint stated a valid claim for interference with contract (Jt. App., pp. 231-232). The Verified Complaint alleged the requisite elements of the tort of interference with contract by Thaxton and Kwascha. In particular, the Verified Complaint alleged that the acts and conduct of Thaxton and Kwascha were done outside the scope of

their employment, in bad faith, for a wrongful purpose, with malice, without any legal justification, and for a reason not reasonably related to the protection of a legitimate business interest (Jt. App., p. 232); *Bloch v. Paul Revere Life Ins. Co.*, 143 N.C. App. 228, 239-240 (2001).

In *Bloch v. Paul Revere Life Ins. Co.*, 143 N.C. App. 228, 239-240 (2001), the North Carolina Court of Appeals held that, with respect to a claim for tortious interference with contract, "non-outsider" status does *not* insulate an individual defendant from liability where the defendant acts without a reasonable-good faith motive. *Bloch, supra*, at 239-240. Bad motive or wrongful purpose is the essence of a claim for tortious interference with contract.

The Petitioner-Appellant's claim for tortious interference with contract stated a claim under North Carolina law which the Fourth Circuit overlooked in concluding that the district court properly dismissed Mr. Freeman's claim against Thaxton and Kwascha for interference with contract.

D. The decision of the Fourth Circuit departed from the accepted course of judicial proceedings in overlooking the material legal matter that the Petitioner-Appellant's state law claim for unfair and deceptive trade practices stated a claim upon which relief can be granted.

Petitioner-Appellant also alleged in his Verified Complaint[2] that the Respondents' unfair and deceptive acts

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[2] In paragraph 11, page 3, of the Petitioner-Appellant's Verified Complaint, the Petitioner-Appellant alleged that the Respondents

and conduct in causing his discharge for alleged "moonlighting" *affected commerce* and were acts and practices "in or affecting commerce" and constituted unfair and deceptive trade practices, which are proscribed by Chapter 75-1.1 of the North Carolina General Statutes (Jt. App., pp. 232-233).

The North Carolina Supreme Court in, *Sara Lee Corp. v. Carter*, 351 N.C. 27, 519 S.E.2d 308 (1999), held that the employment relationship does *not* preclude the applicability of N.C.G.S. § 75-1.1 *et seq*. As Justice Orr stated, the defendant's "mere employee status at the time he committed these acts does not safeguard him from liability under the Act." *Id.* at 34. The North Carolina Supreme Court found that the relevant inquiry was whether or not the business activities and occurrences at issue were "in or affecting commerce." *Id.* at 32.

Contrary to the findings of the Fourth Circuit (Opinion, pp. 12-13), Mr. Freeman alleged that the acts of Thaxton and Kwascha affected commerce, i.e., the business activity of moonlighting, *and not just his employment relationship* (Jt. App., p. 233, paragraph 24). The acts of Thaxton and Kwascha had an impact beyond the employment relationship, affected the consuming public, and had the effect of chilling the practice of moonlighting.

The Petitioner-Appellant's claim for unfair trade practices stated a claim under North Carolina law which the Fourth Circuit overlooked in affirming the order of the district court dismissing Mr. Freeman's claim for unfair and deceptive trade practices.

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unfairly singled him out due to his success and sought a pretext to wrongfully discharge him for the *business activity* of "moonlighting" (Jt. App., p. 154).

CONCLUSION

For the reasons set forth above, the petition for a writ of *certiorari* should be granted and the judgment below reversed.

Respectfully submitted,

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Counsel for Petitioner

Dated January 24, 2005

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

ALBERT L. FREEMAN, Plaintiff,	)	
v.	)	1:00CV00665
DUKE POWER COMPANY, a division Of DUKE ENERGY CORPORATION, and DUKE ENERGY CORPORATION, Defendants.	)	
ALBERT L. FREEMAN, Plaintiff,	)	
v.	)	1:02CV00630
CINDY THAXTON, an individual, and GREGORY KWASCHA, an individual, Defendants.	)	

JUDGMENT

Tilley, Chief Judge

For the reasons stated in a contemporaneously filed Memorandum Opinion, in the 1:00CV00665 action, Plaintiff's Motion to Remand [Doc. #7] is DENIED, Defendant's Motion to Dismiss [Doc. #11] is GRANTED, Plaintiff's Motion to Exclude Evidence and for Leave to Take Discovery [Doc. #25] is MOOT, Plaintiff's Motion to Amend the Complaint [Doc. #28] is DENIED, Defendant's Motion to Consolidate [Doc. #31] is MOOT.

In the 1:02CV00630 case, Defendant's Motion to

Dismiss [Doc. #3] is GRANTED, Defendant's Motion to Consolidate [Doc. #5] is MOOT, and Plaintiff's Motion to Remand [Doc. #8] is DENIED.

This is the 15th day of August, 2003.

/s/
United States District Judge

IN THE UNITED STATES DISTRICT
COURT FOR THE MIDDLE DISTRICT OF
NORTH CAROLINA

ALBERT L. FREEMAN, Plaintiff, v. DUKE POWER COMPANY, a division Of DUKE ENERGY CORPORATION, and DUKE ENERGY CORPORATION, Defendants.	)	1:00CV00665
ALBERT L. FREEMAN, Plaintiff, v. CINDY THAXTON, an individual, and GREGORY KWASCHA, an individual, Defendants.	)	1:02CV00630

MEMORANDUM OPINION

Tilley, Chief Judge

In the 1:00CV00665 action, the following motions are currently pending before the court: Plaintiff's Motion to Remand [Doc. #7], Defendant's Motion to Dismiss [Doc. #11], Plaintiff's Motion to Exclude Evidence and for Leave to Take Discovery [Doc. #25], Plaintiff's Motion to Amend the Complaint [Doc. #28], Defendant's Motion to Consolidate [Doc. #31]..

In the 1:02CV00630 case, the following motions are pending: Defendant's Motion to Dismiss [Doc. #3], Defendant's Motion to Consolidate [Doc. #5] and Plaintiff's Motion to Remand [Doc. #8].

For the reasons set forth below, in the 1:00CV00665 action, Plaintiff's Motion to Remand [Doc. #7] is DENIED, Defendant's Motion to Dismiss [Doc. #11] is GRANTED, Plaintiff's Motion to Exclude Evidence and for Leave to Take Discovery [Doc. #25] is MOOT, Plaintiff's Motion to Amend the Complaint [Doc. #28] is DENIED, Defendant's Motion to Consolidate [Doc. #31 is MOOT].

In the 1:02CV00630 case, Defendant's Motion to Dismiss [Doc. #3] is GRANTED, Defendant's Motion to Consolidate [Doc. #5] is MOOT, and Plaintiff's Motion to Remand [Doc. #8] is DENIED.

I.

The allegations of the complaint, stated in the light most favorable to the Plaintiff, are as follows: Plaintiff Albert Freeman was employed by Duke Power from 1983 to 1999 as a Transmission Line Helper and as a Distribution Line Technician C in Burlington, North Carolina. In 1984, Mr. Freeman obtained a limited contractor's license and 'moonlighted' as an electrician during his off duty hours. Mr. Freeman also alleges that Duke Power was aware of his moonlighting and 'utilized Freeman's services as an electrician in the rewiring of Duke Power buildings.' (Cmp. ¶ 7.)

In 1990, Duke Power transferred a district manager, Ed Holt, to Burlington. Holt did not like 'moonlighting' and accused Mr. Freeman of moonlighting during his Duke Power work day. Around January 26, 1994, Mr. Freeman was suspended and discharged from his employment as a lineman for Duke Power "for allegedly 'removing a service drop and meter and disconnecting service to a customer without authorization from Duke Power Company'" while he was moonlighting. (Cmp. ¶ 11). The union filed a grievance on Mr. Freeman's behalf. Mr. Freeman, the Union, and Duke Power settled the grievance and entered into a Grievance Resolution on June 20, 1994. Pursuant to this agreement, Duke Power agreed to reinstate Mr. Freeman with no loss of service but with no back pay. The Union agreed to withdraw the grievance. The parties also agreed that if Mr. Freeman engaged "directly or indirectly in the business of electrical contracting while employed with Duke Power, Duke Power

could terminate Mr. Freeman's employment for that reason," and Duke Power's decision "shall be final and shall not be subject to review under any grievance or arbitration provision under any Collective Bargaining Agreement in effect at the time of his discharge." (Cmp. ¶ 12.) This agreement was signed by the Duke Power area manager for Burlington/Reidsville, the business manager for the Union, and Mr. Freeman.

In June 1996, Duke Power again suspended Mr. Freeman "allegedly for engaging in the business of electrical contracting." (Cmp. ¶ 14). Mr. Freeman denied having breached the June 1994 Grievance Resolution Agreement. In July 1996, Duke Power, the Union, and Mr. Freeman entered into an Amendment to the Grievance Resolution, which provided that Mr. Freeman was prohibited from "being or becoming employed on a full or part-time basis with any person, firm, or corporation engaging in the business of electrical contracting." (Cmp. ¶ 16). In July 1999, Mr. Freeman was terminated for allegedly violating the Amended Grievance Resolution. Mr. Freeman denies that he violated the Amended Grievance Resolution. The Union did not file a grievance on behalf of Mr. Freeman.

Mr. Freeman filed the action against Duke Power in the General Court of Justice Superior Court Division, Alamance County on June 30, 2000. Mr. Freeman alleges numerous causes of action including: breach of contract, wrongful discharge, a violation of Article 1, Section 1 of the North Carolina State Constitution, and bad faith discharge.

Mr. Freeman filed the action against Cindy Thaxton, Regional Human Resources Manager for Duke Power, and Gregory Kwascha, Burlington Area Manager for Duke Power, in the General Court of Justice Superior Court Division, Alamance County on June 28, 2002. In that case, Mr. Freeman seeks recovery for interference with contract and unfair deceptive trade practices. The defendants in both actions filed timely notices of removal.

II.

The defendants have filed motions to consolidate these cases. For purposes of considering the motions to dismiss, the cases will be consolidated. In light of the fact

that the motions to dismiss will be granted, see discussion below, the Defendants' Motions to Consolidate are MOOT.

Mr. Freeman has filed motions to remand the cases to the Superior Court of Alamance County. Title 28 U.S.C. § 1447(c) requires that a case must be remanded to the state court "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction." 28 U.S.C. § 1447(c) (West Supp. 2002). In the motion to remand, Mr. Freeman asserts that the complaints are based purely on state law and do not raise any federal issues. Defendants, however, assert that federal jurisdiction in these cases is proper because the complaint alleges a breach of a contract between "an employer and a labor organization representing employees in an industry affecting commerce pursuant to Section 301 of the Labor Management Relations Act" ("LMRA").

Generally, the "well-pleaded complaint" rule requires that the federal question appear on the face of the plaintiff's properly pleaded complaint in order for a federal court to exercise jurisdiction. Caterpillar Inc. v Williams, 482 U.S. 386, 392 (1987). In this case, Mr. Freeman has alleged numerous state law causes of action. Against Duke Power, Mr. Freeman has alleged breach of contract, wrongful discharge in violation of public policy, direct claims under Article 1, Section 1 and Article 1, Section 19 of the North Carolina Constitution, and bad faith discharge. As to Mr. Thaxton and Mr. Kwascha, Mr. Freeman has alleged interference with contract and unfair and deceptive trade practices.

On the face of Mr. Freeman's complaint, he appears to raise only state law claims. However, the general rule that the federal question must appear on the face of the plaintiff's complaint is subject to an important exception; "an 'independent corollary' to the well-pleaded complaint rule is the further principle that 'a plaintiff may not defeat removal by omitting to plead necessary federal questions.'" Rivet v. Regions Bank of Louisiana, 522 U.S. 470, 475 (1998) (citations omitted). If a plaintiff has "artfully pleaded" so that federal jurisdiction appears improper, the case may nevertheless be removed if federal law completely preempts a plaintiff's state-law claim because "[o]nce an area of state law has been completely pre-empted, any claim purportedly

based on that pre-empted state-law claim is considered, from its inception, a federal claim, and therefore arises under federal law." Caterpillar, 482 U.S. at 393.

The defendants assert that Mr. Freeman's complaint, alleging state law causes of action, is actually a suit for breach of labor contract under the LMRA and that federal jurisdiction is proper pursuant to § 301 of the LMRA. Section 301 of the LMRA provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter... may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount of controversy or without regard to the citizenship of the parties.

Mr. Freeman asserts that he is not seeking relief based on a collective bargaining agreement but that the Grievance Resolution and the Amended Grievance Resolution ("the agreements") are independent contracts unrelated to the Collective Bargaining Agreement that can be enforced pursuant to state law.

The Fourth Circuit, however, has rejected Mr. Freeman's argument. The Fourth Circuit has held that a settlement agreement that results from an employee grievance filed pursuant to a collective bargaining agreement is not an independent employment contract enforceable pursuant to state law. Rather, such an agreement is a modification or "rider" to the collective-bargaining agreement, which raises a federal question. Davis v. Bell Atlantic-West Virginia, Inc., 110 F. 3d 245, 249 (4th Cir. 1997).

In Davis, the plaintiff had been discharged due to excessive absenteeism. She filed a grievance through the Union pursuant to the collective bargaining agreement. Bell Atlantic, the Union, and Mrs. Davis reached a settlement agreement providing for reinstatement without backpay or damages. The agreement also provided that Ms. Davis would retain the service credit she had received prior to the discharge. Finally, the agreement provided that Ms. Davis would be subject to immediate dismissal for future tardies or absences. Id. Ms. Davis was tardy on numerous occasions

following the execution of the settlement agreement and was terminated.

Ms. Davis filed suit in state court alleging that Bell Atlantic had breached the terms of the collective bargaining agreement and the settlement agreement and also filed a state law tort claim for wrongful discharge. Bell Atlantic removed the case the federal court, and district court denied Ms. Davis' motion to remand on the grounds that the state law claims were preempted by the LMRA. Id.

The Fourth Circuit rejected Ms. Davis' argument that her claim for breach of the settlement agreement was an independent state law claim. Id. at 247. The Fourth Circuit found that the settlement agreement's validity was based upon the collective bargaining agreement because the settlement agreement was reached only through the grievance procedure specified in the collective bargaining agreement. The Court also noted that the settlement specified that Ms. Davis would be credited for her service prior to her initial discharge, and that the service credit "relate[d] to the underlying work relationship between Davis and Bell Atlantic require[d] reference to the collective-bargaining agreement for interpretation and application." Id. at 249.

Mr. Freeman's case mirrors the facts before the Fourth Circuit in Davis. Mr. Freeman, as Ms. Davis, challenged his initial discharge through the initial grievance procedure specified in the collective bargaining agreement. The agreements between Duke Power, Mr. Freeman, and the Union, like the settlement agreement in Davis, provided that Mr. Freeman would be credited for his service prior to the discharge, would not receive back pay, and would be terminated for any future violation of the agreements. As in Davis, the agreements are not independent contracts enforceable under state law but are riders to the collective bargaining agreement. Mr. Freeman's complaint raises issues that "arise under" federal law and federal jurisdiction is proper. The motions to remand are DENIED.

III.

Since jurisdiction is proper pursuant to § 301 of the LMRA, it is now necessary to determine whether the state

law claims alleged by Mr. Freeman are preempted by § 301.[1] In Franchise Tax Board of California v. Construction Laborers Vacation Trust for Southern California, 463 U.S. 1 (1983), the Supreme Court explained that "the pre-emptive force of § 301 is so powerful as to displace entirely any state cause of action 'for violation of contracts between an employer and a labor organization.'" Id. at 23.

However, the Supreme Court has also made it clear that "not every dispute concerning employment, or tangentially involving a provision of a collective-bargaining agreement, is pre-empted by § 301 or other provisions of the federal labor law." Allis-Chalmers v. Lueck, 471 U.S. 202, 211 (1985). The Supreme Court has explained that determining whether a state law claim "is inextricably intertwined with consideration of the terms of the labor contract." Id. at 213 If the state law claim requires an interpretation of the labor contract, then the state law claims would be pre-empted. Thus, it is necessary to consider the causes of action alleged by Mr. Freeman and decide whether resolution of the state law claims would require interpretation of the collective bargaining agreement or riders to the agreement.

Mr. Freeman's first state law claim alleges that Duke Power breached his employment contract. Determining whether Duke Power breached the contract will necessarily involve interpretation of the contract. Thus, it is clear that a breach of counter claim would be preempted. See Allis-Chalmers v. Lueck, 471 U.S. 202, 210-12 (1985) (explaining the preemptive effect of § 301 as applied to breach of counter claims).

Similarly, Mr. Freeman's tortuous interference with contract claim against Ms. Thaxton and Mr. Kwascha is preempted by § 301. The claim stated is for tortuous interference with contract, the elements of which are as follows: (1) a valid contract between plaintiff and a third person; (2) defendants had knowledge of the contract; (3)

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[1] The collective defendants have attached the grievance settlement agreements and the collective bargaining agreement to their moving papers. Mr. Freeman has filed a motion to strike. Because it is unnecessary to consider these attachments, the motion to strike is MOOT.

defendants intentionally induced the third person not to perform the contract; (4) in doing so defendants acted without justification; and (5) plaintiff was damaged thereby. United Laboratories, Inc. v. Kuykendall, 322 N.C. 643, 661, 370 S.E. 2d 375, 387 (1988). In the complaint, Mr. Freeman alleges that Ms. Thaxton and Mr. Kwascha "exceeded their authority," recommended his dismissal "without proper investigation and without a thorough review of the facts", and "acted outside the scope of their employment." Comp. ¶ 11, 12, 17. It will be necessary to analyze the collective bargaining agreement to determine the scope of supervisory authority, the requirements of a proper investigation prior to recommending dismissal, and whether Mr. Freeman's actions violated the riders to the collective bargaining agreement. The tortuous interference with contract claim is preempted.

Next, Mr. Freeman asserts that he was wrongfully discharged in violation of public policy. North Carolina has recognized a claim for wrongful discharge based on public policy as an exception to the employment-at-will doctrine. Coman v. Thomas Manufacturing Co., 325 N.C. 172, 381 S.E. 2d 445 (1989). In the original complaint Mr. Freeman alleged that he was a "member of Local Union 962, International Brotherhood of Electrical Workers, which Union had, at all times relevant hereto, a collective bargaining agreement with the Defendant Duke Power." Comp. ¶ 4. Because wrongful discharge in violation of public policy is an exception to the at-will doctrine, the North Carolina Court of Appeals has held that contract employees cannot state a cause of action for wrongful discharge in violation of public policy. Houpe v. City of Statesville, 128 N.C. App. 334, 343, 497 S.E.2d 82, 88 (1998) (citations omitted) (explaining that [w]rongful termination may be asserted "only in the context of employees at will," and not by an employee "employed for a definite term or… subject to discharge only for 'just cause'").

Mr. Freeman filed a motion to amend his complaint pursuant to Federal Rule of Civil Procedure 15(a) to allege that he was an "at will employee."[2] Determining whether Mr.

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[2] The Motion to Amend is DENIED. The Fourth Circuit has explained that proposed amendments may be denied on the basis of futility if the claims the plaintiff seeks to add would not survive a

Freeman was an at will employee who could bring a wrongful discharge action would require consideration of the terms of the collective bargaining agreement and the grievance settlement agreements. As such, Mr. Freeman's claim that he was wrongfully discharged is preempted by § 301. Mr. Freeman also alleges that Ms. Thaxton and Mr. Kwascha's conduct regarding his termination constitute an unfair and deceptive trade practice under North Carolina law. Assuming that an unfair and deceptive trade practice claim would not be preempted by § 301, Mr. Freeman has failed to state a claim for relief. To state a claim for relief for unfair and deceptive trade practices under N.C. Gen. Stat. § 75-1.1, a plaintiff must show (1) an unfair or deceptive act or practice by the defendant, (2) in or affecting commerce, (3) which proximately caused actual injury to plaintiff. Miller v. Nationwide Mut. Ins. Co., 112 N.C. App. 295, 435 S.E.2d 537 (1993). As the North Carolina Supreme Court has explained, the Unfair and Deceptive Trade Practices Act was intended to benefit consumers, Pearce v. American Defender Life Ins. Co., 316 N.C. 461, 469, 343 S.E.2d 174, 179 (1986). The North Carolina Court of Appeals has explained that "employer-employee relationships do not fail within the intended scope" of Chapter 75 because "[e]mployment practices fall within the purview of other statutes adopted for that express purpose." Buie v. Daniel International, 56 N.C.App. 445, 448, 289 S.E.2d 118, 119-120 (1982). It is undisputed that Mr. Freeman's claims arise from his employment. The defendants' motion to dismiss the unfair and deceptive trade practices act claim is GRANTED.

Mr. Freeman has also alleged a claim for bad faith discharge and direct claims under Article I, Section 1 and 10. North Carolina does not recognize an independent tort for bad faith discharge. Amos v. Oakdale Knitting Co., 331 N.C. 348, 359, 416 S.E.2d 166, 173 (1992). Duke Power's Motion to Dismiss the bad faith discharge claim is GRANTED and the claim is DISMISSED.

Article I, Section 1 of the North Carolina Constitution provides:

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motion to dismiss. See Burns v. AAF-McQuay, Inc., 166 F.3d 292, 294-95 (4th Cir. 1999).

> We hold it to be self-evident that all persons are created equal; that they are endowed by their creator with certain inalienable rights; that among these are life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness.

Mr. Freeman asserts that the "moonlighting" provision of the settlement agreements violates the "fruits of their own labor" provision of Article I, Section1 of the North Carolina Constitution. The North Carolina Court of Appeals, however, has previously rejected the argument holding that Article I, Section 1 "does not give [the plaintiff] a remedy against a corporate defendant" in a private dispute. Teleflex Information Systems, Inc. v. Arnold, 132 N.C. App. 689, 693, 513 S.E.2d 85, 88 (1999) (citing Real Estate Licensing Board v. Aikens, 31 N.C. App. 8, 13, 228 S.E.2d 493, 496 (1976) and explaining that the "fundamental provisions of our State Constitution, such as Article I, Section 1, were inserted to guarantee the right to pursue ordinary and simple occupations free from *governmental regulation*") (emphasis added) (international quotations omitted). Duke Power's Motion to Dismiss the Article I, Section 1 claim is GRANTED and the claim is DISMISSED.

Article I, Section 19 of the North Carolina Constitution, often referred to as the Law of the Land Clause, is considered the equivalent of the Due Process Clause of the United States Constitution. Lorbacher v. Housing Authority of the City of Raleigh, 127 N.C.App. 663, 674-75, 493 S.E.2d 74, 81 (1997). A direct claim under the North Carolina Constitution can be made in the absence of an adequate legal remedy. Corum, 330 N.C. at 782, 413 S.E.2d at 289. As discussed below, Mr. Freeman was entitled to seek relief pursuant to § 301 of the LMRA. He is not without an adequate legal remedy and thus cannot state a claim directly under the North Carolina Constitution. Duke Power's Motion to Dismiss the Article I, Section 19 claim is GRANTED and the claim is DISMISSED.

IV.

Finally, because Mr. Freeman's state law claims are preempted by § 301 of the LMRA, it is necessary to

determine whether Mr. Freeman has stated a viable claim under § 301 which allows an aggrieved employee the right to bring a suit in federal court. To state a claim against an employer for breach of a collective bargaining agreement under § 301, the employee must first "attempt to exhaust exclusive grievance and arbitration procedures established by the bargaining agreement." Vaca v. Sipes, 386 U.S. 171, 184 (1967). If those administrative remedies have been exhausted, the plaintiff must also establish that "the union as bargaining agent breached its duty of fair representation in its handling of the employee's grievance." Id. at 186.

In this case, it is not necessary to consider whether Mr. Freeman has satisfied these two prongs because he did not file his action within the applicable time period. A six month statute of limitations controls a suit brought under § 301 alleging a breach of contract against the employer and failure if proper representation against the union. DelCostello v. Int'l Bhd of Teamsters, 462 U.S. 151, 172 (1983). Mr. Freeman was terminated in July 1999. His action in the state court was filed June 30, 2000, outside the six month statute of limitations. The defendants' Motions to Dismiss are GRANTED, and this case is DISMISSED.

V.

In summary, in the 1:00CV00665 action, Plaintiff's Motion to Remand [Doc. #7] is DENIED, Defendant's Motion to Dismiss [Doc. #11] is GRANTED, Plaintiff's Motion to Exclude Evidence and for Leave to Take Discovery [Doc. #25] is MOOT, Plaintiff's Motion to Amend the Complaint [Doc. #28] is DENIED, Defendant's Motion to Consolidate [Doc. #31] is MOOT.

In the 1:02CV00630 case, Defendant's Motion to Dismiss [Doc. #3] is GRANTED, Defendant's Motion to Consolidate [Doc. #5] is MOOT, and Plaintiff's Motion to Remand [Doc. #8] is DENIED.

This is the 15th day of August, 2003.

/s/
United States District Judge

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ALBERT L. FREEMAN, *Plaintiff-Appellant,* v. DUKE POWER COMPANY, a Division of Duke Energy Corporation; DUKE ENERGY CORPORATION, *Defendants-Appellees.*	No. 03-2146

ALBERT L. FREEMAN, *Plaintiff-Appellant,* v. CINDY THAXTON; GEORGE KWASCHA, *Defendants-Appellees.*	No. 03-2147

Appeals from the United States District Court
for the Middle District of North Carolina, at Durham.
N. Carlton Tilley, Jr., Chief District Judge.
(CA-00-665-1; CA-02-630-1)

Argued: June 4, 2004

Decided: September 27, 2004
Before WIDENER and SHEDD, Circuit Judges, and
David R. HANSEN, Senior Circuit Judge of the
United States Court of Appeals for the Eighth Circuit,
sitting by designation.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Fred Thurman Hamlet, Sr., Greensboro, North Carolina, for Appellant. Dena Beth Langley, NEXSEN PRUET ADAMS KLEEMEIER, P.L.L.C., Greensboro, North Carolina, for Appellees.
ON BRIEF: Brian S. Clarke, NEXSEN PRUET ADAMS KLEEMEIER, P.L.L.C., Greensboro, North Carolina, for Appellees.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

The district court dismissed both of Albert Freeman's state law actions, one against Duke Power Company (Duke Power) and one against Cindy Thaxton and George Kwascha, on the bases that all of the state law claims raised in the two cases were either preempted by § 301 of the Labor Management Relations Act (LMRA) and failed to state claims under the LMRA, or, if not preempted, failed to state a claim under state law. Freeman appeals, and we affirm.

I.

Because the district court granted the defendants' motions to dismiss the plaintiff's complaints for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), we take the allegations in the complaints as true and construe the facts in the light most favorable to the plaintiff. *Franks v. Ross*, 313 F.3d 184, 192 (4th Cir. 2002). Albert Freeman worked for Duke Power as a Transmission Line Helper and as a Distribution Line Technician C from 1983 until 1999 pursuant to a collective bargaining agreement (CBA) between Duke Power and Freeman's union, Local Union 962, International Brotherhood of Electrical Workers (Union). In 1984, Freeman obtained a limited electrical contractor's license and "moonlighted" as an electrician during his off-

duty time performing small electrical jobs. Duke Power was aware of Freeman's moonlighting activities and took no employment action against him between 1984 and 1994.

In January 1994, Freeman was suspended and discharged from employment as a lineman "for allegedly removing a service drop and meter and disconnecting service to a customer without authorization from Duke Power Company." (J.A. at 11-12.) The Union filed a grievance on Freeman's behalf pursuant to the grievance procedures of the CBA. In settlement of the grievance, Duke Power, the Union, and Freeman entered into a Grievance Resolution, under which Duke Power agreed to reinstate Freeman to his lineman position, the Union agreed to withdraw the grievance, and Freeman agreed not to engage, directly or indirectly, in the business of electrical contracting while employed with Duke Power. The Grievance Resolution provided that Duke Power could discharge Freeman if he engaged in electrical contracting, and that the discharge decision would be final and would not be subject to the grievance procedures of the CBA in effect at the time of any future discharge.

In June 1996, Duke Power suspended and proposed to discharge Freeman a second time, asserting that Freeman violated the Grievance Resolution by engaging in electrical contracting. Freeman asserted that he did not violate the Grievance Resolution. In settling the dispute, the Union, Duke Power, and Freeman entered into an Amendment to the Grievance Resolution (Amendment) on July 3, 1996. The Amendment prohibited Freeman from being or becoming employed on a full- or part-time basis with any entity engaged in the business of electrical contracting. In the Amendment, Duke Power agreed not to terminate Freeman for the then current alleged violation of the Grievance Resolution, and Freeman agreed not to engage in the business of electrical contracting in the future. The Amendment provided that Duke Power could terminate Freeman's employment if he violated the Amendment, and that such termination would be final and would not be subject to the arbitration or grievance procedures under the CBA then in effect. In July 1999, Duke Power suspended and ultimately discharged Freeman for allegedly violating the Amendment.

The Union declined to file a grievance for Freeman.

Freeman brought an action in North Carolina state court against Duke Power, alleging breach of contract, wrongful discharge, violations of North Carolina's constitution, and bad faith discharge. He brought a separate state court action against Cindy Thaxton and George Kwascha, his immediate supervisors, for interference with contract and violation of North Carolina's unfair and deceptive trade practices act. The defendants in both cases removed the cases to federal court and filed motions to dismiss the cases for failure to state a claim. The defendants also sought to consolidate the cases in federal court. Freeman resisted the motions and moved to remand the cases back to state court, to amend his complaint, to exclude evidence attached to the defendants' motions to dismiss, and to conduct discovery.

The district court denied Freeman's motion to remand the cases to state court because the complaints in both cases raised issues arising under federal law, specifically the LMRA. The court determined that Freeman's claims against Duke Power for breach of contract and wrongful discharge were preempted by § 301 of the LMRA and granted the defendants' motions to dismiss because the claims were brought beyond the applicable statute of limitation. The district court denied Freeman's motion to amend his complaint to allege that he was an at-will employee because the allegation would not have changed the fact that the claim was preempted by the LMRA. The district court dismissed the bad faith discharge and state constitutional claims as failing to state claims cognizable under North Carolina law.

The district court determined that Freeman's claim against the individual defendants for interference with contract was also preempted by the LMRA and subject to dismissal as untimely. It determined that even if the unfair and deceptive trade practices claim was not preempted by the LMRA, such a claim was unavailable under North Carolina law in the employment setting. The district court found that the defendants' motions to consolidate and Freeman's motions to exclude evidence and conduct discovery were all mooted by the dismissals. Freeman appeals.

II.

A. Removal Jurisdiction

Freeman argues on appeal that both of his cases should have been remanded to state court because both complaints raised only state law claims. Actions brought in state court are removable to federal court if the complaint raises a federal question. *See* 28 U.S.C. §§ 1331, 1441(a) (2000). To determine whether a complaint raises a federal question, we apply the "well-pleaded complaint" rule, which prevents a defendant from removing a case to federal court unless the plaintiff's complaint, without consideration of any potential defenses, establishes that the case arises under federal law. *Aetna Health Inc. v. Davila*, 124 S. Ct. 2488, 2494 (2004). A corollary to the wellpleaded complaint rule allows an action to be removed, notwithstanding the absence of a federal question in the plaintiff's complaint, if "a federal statute wholly displaces the state-law cause of action through complete pre-emption." *Id.* at 2495 (internal marks omitted). Even though the action alleges only state law claims, if those claims are completely preempted by federal law, the complaint "is in reality based on federal law." *Id.* (internal marks omitted).

The preemptive force of § 301 of the LMRA is unquestionably broad. *See Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 23-24 (1983). Section 301 totally displaces state causes of action related to contracts between employers and labor organizations, as well as other claims the resolution of which depends substantially on the interpretation of a CBA. *See Davis v. Bell Atlantic-W.V., Inc.*, 110 F.3d 245, 247 (4th Cir. 1997).

1. Action Against Duke Power

The *Davis* case is factually similar to Freeman's case against Duke Power, and its reasoning controls the outcome. In *Davis*, an employee entered a settlement agreement with her employer and union that settled a grievance brought pursuant

to the CBA when the employer attempted to terminate the employee for absenteeism. *Davis*, 310 F.3d at 246. The settlement agreement reinstated the employee and provided that the employee was subject to immediate termination, without recourse to the grievance procedures in the CBA, if she violated the settlement agreement. The employee was subsequently terminated for violating the settlement agreement, and she brought state law claims for breach of the CBA, breach of the settlement, and wrongful discharge. *Id.* As relevant here, this court held that the claim for breach of the settlement agreement was preempted because it depended on rights conferred on the employee by the CBA.[1] The settlement agreement derived from the CBA, in fact was entered as a result of a grievance proceeding brought pursuant to the CBA, and therefore its "entire vitality and legitimacy" drew from the CBA. *Id.* at 248. In the case at bar, the Union followed the grievance procedure in the CBA and entered into settlement negotiations with Duke Power, on Freeman's behalf, that resulted in the Grievance Resolution and Amendment in lieu of arbitration as provided by the CBA. Without the CBA, the Grievance Resolution and Amendment would not have existed. Settlements of employee grievances that are entered pursuant to the terms of a CBA are labor contracts within the meaning of § 301, which "preempts an alleged breach of the Union-negotiated agreement that settled an employee grievance." *Id.* at 249 (citing cases holding same).

Freeman attempts to distinguish *Davis* on the basis that certain terms used in the *Davis* settlement agreement were defined in the CBA, whereas there are no terms in the Grievance Resolution or the Amendment that need to be defined by reference to the CBA. However, the *Davis* court did not rely on the mutuality of terms for its holding. *Id.* ("While an independent employment contract's mere

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[1] Contrary to Freeman's assertions that the *Davis* court's discussion of the settlement agreement was dicta because Davis alleged breach of the CBA (Appellant's Br. at 21 n.1), the *Davis* court addressed the claims for breach of the CBA and breach of the settlement agreement as distinct claims.

borrowing of one or more terms from a [CBA] does not in itself bring that contract within the scope of § 301 preemption, the settlement agreement here was not an independent employment contract . . . . The Union's [CBA] remained in full force to govern [the employee's] employment relationship except insofar as it was modified by the settlement agreement." (internal citations omitted)). The court construed the settlement agreement as a rider to the CBA. *Id.*

Although disputes arising over independent employment contracts unrelated to a CBA are not preempted by § 301 of the LMRA, *see Caterpillar Inc. v. Williams*, 482 U.S. 386, 394-95 (1987), the Grievance Resolution and the Amendment are not independent of the CBA. The employees in *Caterpillar* had entered separate management contracts and only later became subject to a CBA when they were demoted. Their state law action was based on the management contracts, not anything derivative of the CBA, and thus was not preempted by the LMRA. *Id.* at 395 & n.9. The same cannot be said in the instant case, as the Grievance Resolution and Amendment derive their "entire vitality and legitimacy" from the CBA. *Davis*, 110 F.3d at 248.

The district court also determined that § 301 of the LMRA preempted Freeman's wrongful discharge claim against Duke Power. Freeman alleged in his complaint that Duke Power wrongfully discharged him in violation of North Carolina public policy as reflected in the state constitution, which protects an individual's right to "the enjoyment of the fruits of [his] own labor." N.C. Const. art. I, § 1. Freeman's wrongful discharge claim is preempted by the LMRA if it is "inextricably intertwined with consideration of the terms of the labor contract. If the state tort law purports to define the meaning of the contract relationship, that law is pre-empted." *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 213 (1985).

The Supreme Court of North Carolina has recognized a cause of action for wrongful discharge in violation of public policy as a narrow exception to North Carolina's long-standing employment-at-will doctrine. *See Coman v. Thomas Mfg. Co.*, 381 S.E.2d 445, 447 (N.C. 1989). However, "[t]he tort of

wrongful discharge arises only in the context of employment at will." *Claggett v. Wake Forest Univ.*, 486 S.E.2d 443, 448 (N.C. Ct. App. 1997) (dismissing wrongful discharge claim brought by a university professor who was covered by a contract). Contract employees are limited to contract remedies. Resolution of the wrongful discharge claim would require a determination of the type of employment relationship between Freeman and Duke Power, regardless of whether Freeman pleads that he is a contract employee or an at-will employee. Such an analysis necessarily would involve construction of the CBA, the Grievance Resolution, and the Amendment to determine what type of employment relationship existed between Freeman and Duke Power. The wrongful discharge claim is therefore preempted by the LMRA. *Allis-Chalmers*, 471 U.S. at 213.

Because Freeman's claims of breach of contract and wrongful discharge are preempted by § 301 of the LMRA and therefore raise a federal question, the district court properly retained jurisdiction over Freeman's case against Duke Power, and no remand to state court was in order.

2. Action Against Thaxton & Kwascha

Freeman brought state law claims of tortious interference with contract and unfair and deceptive trade practices against two of his supervisors, alleging that they intentionally induced Duke Power to terminate his employment. The district court determined that the interference with contract claim was completely preempted by § 301 because it required interpretation of Thaxton's and Kwascha's supervisory authority as defined in the CBA, as well as a determination of whether Freeman violated the Grievance Resolution and Amendment. We agree.

As discussed above, a state law claim is completely preempted by the LMRA if it relates to contracts between employers and labor organizations, or if resolution of the claim depends substantially on the interpretation of a CBA. *See Davis*, 110 F.3d at 247. To state a claim for tortious interference with contract against Thaxton and Kwascha under North Carolina law, Freeman had to establish that (1)

he had a valid contract with Duke Power that gave Freeman contractual rights; (2) the defendants knew of the contract; (3) the defendants intentionally induced Duke Power not to perform the contract; (4) the defendants acted without justification; and (5) Freeman was thereby damaged. *Embree Const. Group, Inc. v. Rafcor, Inc.*, 411 S.E.2d 916, 924 (N.C. 1992).

Freeman stated in his complaint that he had an employment agreement with Duke Power that gave him certain legal rights and privileges, that Thaxton and Kwascha intentionally induced Duke Power to terminate the contract, and that Thaxton's and Kwascha's conduct was outside of the scope of their employment (as Freeman's supervisors), in bad faith, for a wrongful purpose, with malice, and without any legal justification. (J.A. at 231-32.) A court would need to interpret the Grievance Resolution, the Amendment, and the CBA in an effort to determine Freeman's contractual rights, the extent of Thaxton's and Kwascha's supervisory authority, and whether Duke Power failed to perform its obligations to Freeman. We therefore hold that Freeman's claim against Thaxton and Kwascha for tortious interference with contract was preempted by § 301 of the LMRA. *See Int'l Union, United Mine Workers of Am. v. Covenant Coal Corp.*, 977 F.2d 895, 899 (4th Cir. 1992) ("Clearly, the third element of this cause of action [under Virginia law], requiring a breach or termination of the contractual relationship, necessitates interpretation of the [CBA]."); *Steinbach v. Dillon Cos.*, 253 F.3d 538, 540 (10th Cir. 2001) (holding that a tortious interference claim alleging that a third party caused the employer to wrongfully terminate an employee was preempted by § 301 where the claim required a determination of whether the employer failed to perform the contract); *Kimbro v. Pepsico, Inc.*, 215 F.3d 723, 727 (7th Cir. 2000) (holding that an employee's state law claims for tortious interference with contract against a supervisor and a third party were preempted by § 301 where the claims would require interpretation of the CBA). The district court properly exercised jurisdiction over Freeman's case against Thaxton and Kwascha.

B. Dismissal for Failure to State a Claim

Having determined that the district court properly exercised jurisdiction over both of Freeman's complaints, we turn now to the district court's dismissal of each of his claims. Where state law claims are preempted by the LMRA, the claim may still survive if it states a claim under the federal statute. *See Allis Chalmers Corp.*, 471 U.S. at 220 ("[The] claim must either be treated as a § 301 claim, . . . or dismissed as pre-empted by federal labor-contract law.").

1. Claims Against Duke Power

a. Breach of Contract/Wrongful Discharge

The district court dismissed Freeman's claims against Duke Power for breach of contract and wrongful discharge for failing to state a § 301 claim because both claims were brought outside of the applicable statute of limitations, borrowing the six-month limitation period contained in § 10(b) of the National Labor Relations Act (NLRA), 29 U.S.C. § 160(b) (2000). If a federal statute is silent as to the applicable statute of limitations, we generally borrow the most analogous state limitations period. *See DelCostello v. Int'l Bhd. of Teamsters*, 462 U.S. 151, 158 (1983). To avoid frustrating federal policy, however, courts should borrow a limitations period from an analogous federal statute if that statute clearly provides a closer analogy than available state statutes. *Id.* at 172.

The NLRA proscribes "unfair labor practices" and provides a sixmonth period within which to bring an unfair labor practices claim. 29 U.S.C. § 160(b). The six-month period takes into account "the national interests in stable bargaining relationships and finality of private settlements, and an employee's interest in setting aside what he views as an unjust settlement under the collective-bargaining system." *DelCostello*, 462 U.S. at 171 (internal marks omitted).

In this case, Freeman twice settled grievances filed on his behalf by the Union with Duke Power. The settlements provided that Duke Power could terminate Freeman for

engaging in electrical contracting, and that Duke Power's decision to do so "shall be final." (J.A. at 12.) Freeman's claims for breach of contract and wrongful discharge challenge Duke Power's decision to terminate his employment despite his agreement in the settlement negotiations that Duke Power's decision would be final. Allowing Freeman to use the three-year statute of limitation provided under North Carolina law for breach of contract claims would undermine the NLRA's delicate balance between the competing interests of promoting the finality of private settlements and avoiding unjust settlements. *See DelCostello*, 462 U.S. at 171. The district court appropriately borrowed the NLRA's six-month statute of limitation and properly dismissed the breach of contract and wrongful discharge claims as being brought outside of that period.

b. Direct Claims Under the State Constitution

Freeman asserted in the third count of his complaint that Duke Power's actions in limiting his ability to moonlight violated the North Carolina constitutional provision recognizing the inalienable right of all persons to "the enjoyment of the fruits of their own labor." N.C. Const. art. I, § 1. North Carolina's courts do not recognize a cause of action based on article I, section 1 of the state constitution to remedy private employment disputes. *See Teleflex Info. Sys., Inc. v. Arnold*, 513 S.E.2d 85, 88 (N.C. Ct. App. 1999) (affirming summary judgment for employer in suit brought by at-will employee claiming that his firing violated article I, section 1 of the state constitution). Rather, the provision limits *the state's* ability to regulate an individual's livelihood. *Id.* ("[T]he declaration of rights in [the North Carolina] State Constitution was inserted 'chiefly to protect the individual *from the State*.'" (quoting *North Carolina v. Ballance*, 51 S.E.2d 731, 734 (1949))). Thus, the district court properly dismissed Freeman's state constitutional claim.

Likewise, Freeman's direct cause of action under article I, section 19 of the state constitution, providing that no person shall be deprived of his property but by the law of the land, also fails. Article I, section 19 is the North Carolina state constitution's equivalent of the federal Constitution's

Fourteenth Amendment due process clause. Both provisions protect individuals only against governmental action. Thus, Freeman has no cognizable action based on the state constitution against his wholly private employer. *See N.C. Nat'l Bank v. Burnette*, 256 S.E.2d 388, 394 (N.C. 1979) ("This constitutional [due process] shield does not protect citizens from the actions or activities of other private individuals."); *Weston v. Carolina Medicorp, Inc.*, 402 S.E.2d 653, 656-57 (N.C. Ct. App. 1991) ("'[S]tate action' is required to trigger the protections of the 'synonymous' due process provisions of the Fourteenth Amendment to the United States Constitution and Article 1, § 19 of the North Carolina Constitution."). The district court properly dismissed Freeman's third count.

c. Bad Faith Discharge

Freeman argues that North Carolina courts are "undecided" as to whether a bad faith discharge claim is separately cognizable in North Carolina. The Supreme Court of North Carolina, however, unequivocally stated, in disagreeing with two of the federal district court cases relied upon by Freeman, that it "did not recognize a separate claim for wrongful discharge in bad faith" in a prior case. *Amos v. Oakdale Knitting Co.*, 416 S.E.2d 166, 173 (N.C. 1992). The district court properly dismissed Freeman's fourth count against Duke Power.

2. Claims Against Thaxton and Kwascha

a. Tortious Interference With Contract

Because the tortious interference claim is preempted, Freeman's claim must be dismissed unless it states a valid § 301 claim. Section 301 allows claims for "violations of contracts between an employer and a labor organization." 29 U.S.C. § 185 (2000). "Applying the most natural interpretation of this language, we [have previously held] that a suit against a non-signatory of a contract cannot be considered a suit for violation of the contract." *Covenant Coal Corp.*, 977 F.2d at 897. Bound, as both it and we are by prior controlling and unquestioned circuit precedent, the district court properly dismissed Freeman's claim against

Thaxton and Kwascha for interference with contract.

b. Unfair and Deceptive Trade Practices

To state a claim for unfair and deceptive trade practices against Thaxton and Kwascha under North Carolina General Statutes § 75-1.1, Freeman must establish that (1) the defendants "committed an unfair or deceptive act or practice, (2) the action in question was in or affecting commerce, and (3) the act proximately caused injury to the plaintiff." *Dalton v. Camp*, 548 S.E.2d 704, 711 (N.C. 2001). "The purpose of G.S. 75-1.1 is to provide a civil means to maintain ethical standards of dealings between persons engaged in business and the consuming public within this State[,] and [it] applies to dealings between buyers and sellers at all levels of commerce." *Sara Lee Corp. v. Carter*, 519 S.E.2d 308, 311 (N.C. 1999) (internal marks omitted) (alterations in original). The statute generally does not apply to employment situations, *see Dalton*, 548 S.E.2d at 711, though the existence of an employment relationship will not necessarily defeat a claim if the parties are otherwise involved in a business relationship. *See Sara Lee Corp.*, 519 S.E.2d at 312 (allowing an unfair trade practices claim brought by an employer against an employee where the employee was involved in buyer-seller transactions with his employer).

Freeman's complaint alleges only that the individual defendants acted to cause Duke Power to terminate Freeman's employment contract. (J.A. at 232-34.) Although N.C.G.S. § 75-1.1(b) defines "commerce" broadly as "business activities, however denominated," the Supreme Court of North Carolina has cautioned that the act "is not intended to apply to all wrongs in a business setting," including most employment disputes. *Dalton*, 548 S.E.2d at 657 (distinguishing *Sara Lee* on the basis that the employee in *Sara Lee* owed a fiduciary duty to his employer, and the employee was entrenched in a buyer-seller relationship with his employer, which fell squarely within the purview of the unfair trade practices act). Freeman's allegation that the defendants caused Duke Power to terminate him fails to meet the requirement that the defendants' acts be in or affecting commerce, *see Durling v. King* 554 S.E.2d 1, 4-5 (N.C. Ct.

App. 2001) (affirming summary judgment where "no evidence was presented that the subject transactions had any impact beyond the parties' employment relationships"), and he therefore failed to state a claim under the state unfair and deceptive trade practices act.

III.

We affirm the district court's order denying Freeman's motions to remand and dismissing Freeman's complaints against Duke Power and against Thaxton and Kwascha. We also affirm the district court's denial of the various pending motions as the dismissal of all claims makes the motions moot.

AFFIRMED

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
October 26, 2004

No. 03-2146
CA-00-665-1

ALBERT L. FREEMAN,
Plaintiff-Appellant,

v.

DUKE POWER COMPANY, a division
Of DUKE ENERGY CORPORATION,
and DUKE ENERGY CORPORATION,
Defendants-Appellees.

No. 03-2147
CA-02-630-1

ALBERT L. FREEMAN,
Plaintiff-Appellant,

v.

CINDY THAXTON, an individual,
and GREGORY KWASCHA,
an individual,
Defendants-Appellees.

On Petition for Rehearing and Rehearing En Banc

The appellant's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

Entered for a panel comprised of Judge Widener, Judge Shedd, and Judge Hansen.

For the Court,

/s/ Patricia S. Connor

Clerk

(2)

Supreme Court, U.S.
FILED
FEB 28 2005
OFFICE OF THE CLERK

No. 04-1011

In The Supreme Court of the United States

ALBERT L. FREEMAN,

Petitioner,

v.

DUKE POWER COMPANY, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the Fourth Circuit conclude correctly, based on well-established precedent, that a settlement agreement entered as a result of a grievance brought by a union pursuant to the terms of a collective bargaining agreement is a labor "contract" within the meaning of Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a) (hereinafter "LMRA Section 301")?

2. Did the Fourth Circuit conclude correctly, based on well-established precedent, that Petitioner Albert L. Freeman's claims for breach of contract, wrongful discharge and tortious interference with contract were completely preempted by LMRA Section 301?

3. Did the Fourth Circuit conclude correctly, based on well-established precedent, that Petitioner Albert L. Freeman's claims for breach of contract and wrongful discharge were barred by the six-month statute of limitations for "hybrid" LMRA Section 301 claims pursuant to *DelCostello v. Int'l Bhd. of Teamsters*, 462 U.S. 151, 158, 103 S.Ct. 2281, 2287 (1983)?

4. Did the Fourth Circuit conclude correctly, based on well-established precedent, that Petitioner Albert L. Freeman's claim for tortious interference with contract failed to state a claim upon which relief could be granted under LMRA Section 301?

5. Did the Fourth Circuit conclude correctly, based on well-established precedent, that Petitioner Albert L. Freeman's claim for unfair and deceptive trade practices failed to state a claim upon which relief could be granted under North Carolina law?

CORPORATE DISCLOSURE STATEMENT

Respondent "Duke Power Company" is an operating unit of respondent Duke Energy Corporation, is not a separate corporate entity and has no stock. Accordingly, no publicly-held company owns 10% or more of its stock.

Respondent Duke Energy Corporation is a publicly-held company. Duke Energy Corporation has no parent company and no publicly-held company owns 10% or more of its stock.

Respondents Cindy Thaxton and George Kwascha are individuals.

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STATEMENT OF THE CASE

From 1983 until July of 1999, petitioner Albert L. Freeman ("Freeman") was employed by respondents Duke Power Company and Duke Energy Corporation (collectively "Duke") as a "lineman" in Burlington, North Carolina. *See* Petition Appendix ("Petition Appx.") B at p. 2b. Freeman was a member of Local Union 962, International Brotherhood of Electrical Workers (hereafter the "Union"), which had, at all relevant times, various collective bargaining agreements with Duke (collectively the "CBA"). *Id.*

On or around January 26, 1994, Freeman was suspended and then discharged from his employment as a lineman for removing a service drop and meter and disconnecting service to a customer without authorization from Duke, while moonlighting as an electrical contractor. *Id.* at p. 3b. The Union filed a grievance on behalf of Freeman under the "Grievances" provision of the then existing CBA. *Id.* Prior to the referral of this grievance to arbitration as provided by the CBA, Duke and the Union settled the grievance and Duke, the Union, and Freeman entered into an agreement entitled "Grievance Resolution." *Id.* Pursuant to the "Grievance Resolution," Duke, the Union, and Freeman agreed, *inter alia*, that Duke would reinstate Freeman with no loss of service under the CBA, but with no back pay; the Union agreed to withdraw the grievance; and Freeman agreed not to engage, directly or indirectly, in the business of electrical contracting while employed with Duke. *Id.* The Grievance Resolution provided that Duke could discharge Freeman if he engaged in electrical contracting and that the discharge decision would be final and would not be subject to the grievance procedures of the CBA in effect at the time of any future discharge. *Id.*

In June 1996, Duke Power suspended and proposed to discharge Freeman a second time, asserting that Freeman violated the Grievance Resolution by engaging in electrical contracting. *Id.* Freeman asserted that he did not violate the Grievance Resolution. *Id.* In settling the dispute, the Union, Duke, and Freeman entered into an Amendment to the Grievance Resolution (the "Amendment") on or about July 3, 1996. *Id.* The Amendment prohibited Freeman from being or becoming employed on a full- or part-time basis with any entity engaged in the business of electrical contracting. *Id.* In the Amendment, Duke agreed not to terminate Freeman for the then current violation of the Grievance Resolution, and Freeman agreed not to engage in the business of electrical contracting in the future. *Id.* The Amendment provided that Duke could terminate Freeman's employment if he violated the Amendment and that such termination would be final and would not be subject to the arbitration or grievance procedures under the CBA. *Id.*

In July of 1999, Duke suspended Freeman and then terminated Freeman's employment for breaching the terms of the Grievance Resolution and the Amendment by engaging in the business of electrical contracting. *Id.* The Union did not file a grievance pursuant to the CBA on behalf of Freeman regarding his July 1999 termination. *Id.* at p. 4b.

On or about June 30, 2000, Freeman filed a complaint against Duke in the General Court of Justice, Alamance County, North Carolina asserting state law claims for breach of employment contract, wrongful discharge, bad faith discharge and violation of the North Carolina Constitution. *Id.* Duke removed the action to federal court on the ground that Freeman's state law claims were completely

preempted by LMRA Section 301, 29 U.S.C. § 185(a). Duke moved to dismiss Freeman's claims; Freeman moved to remand. *Id.*

On or about June 28, 2002, Freeman filed a separate action in the General Court of Justice, Alamance County, North Carolina, against respondents Cindy Thaxton ("Thaxton") and George Kwascha ("Kwascha"), two management employees at Duke. *Id.* This action asserted claims for tortious interference with contract and unfair and deceptive trade practices. *Id.* Thaxton and Kwascha removed this action to federal court based on complete preemption by LMRA Section 301 and moved to dismiss. Freeman moved to remand. *Id.*

The District Court granted both motions to dismiss and denied Freeman's motions to remand. *See* Petition Appx. A. Freeman appealed to the United States Court of Appeals for the Fourth Circuit.

On September 27, 2004, the Fourth Circuit, by unpublished *per curiam* opinion, affirmed the District Court in all respects. *See Freeman v. Duke Power Co.*, 114 Fed. Appx. 526 (4th Cir. 2004) (per curiam) (unpublished); Petition Appx. B. As a preliminary matter, the Fourth Circuit concluded that, based on established precedent, the Grievance Resolution and the Amendment were labor "contracts" within the meaning of LMRA Section 301 because they "derive[d] their 'entire vitality and legitimacy' from the CBA." *Freeman*, 114 Fed. Appx. at 531-32 (quoting *Davis v. Bell Atlantic-West Virginia, Inc.*, 110 F.3d 245, 248 (4th Cir. 1997)); Petition Appx. B at pp. 6b-7b. The Fourth Circuit concluded further that Freeman's breach of contract and wrongful discharge claims against Duke and his tortious interference claim against Thaxton and Kwascha were completely preempted by LMRA

Section 301. *Freeman*, 114 Fed. Appx. at 532-33; Petition Appx. B at pp. 8b-9b. Accordingly, the Fourth Circuit held that the District Court properly exercised subject matter jurisdiction over both actions and affirmed the District Court's denial of the motions to remand. *Id.*

The Fourth Circuit treated the breach of contract and the wrongful discharge claims against Duke as LMRA Section 301 claims. *Freeman*, 114 Fed. Appx. at 533 (citing *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 220, 105 S.Ct. 1904, 1915 (1985)); Petition Appx. B at p. 10b. The Fourth Circuit then considered whether these claims were timely under LMRA Section 301. *Id.* As directed by this Court in *DelCostello v. Int'l Bhd. of Teamsters*, 462 U.S. 151, 158, 103 S.Ct. 2281, 2287 (1983), the Fourth Circuit applied the six-month statute of limitations found in Section 10(b) of the National Labor Relations Act (the "NLRA"), 29 U.S.C. § 160(b), and held that these claims against Duke were time barred. *Freeman*, 114 Fed. Appx. at 533-34 (citing *DelCostello*, 462 U.S. at 158, 103 S.Ct. at 2287); Petition Appx. B at pp. 10b-11b. It further held that Freeman's claims against Duke for "bad faith discharge" and for violation of the North Carolina Constitution failed to state claims under North Carolina law.[1] *Freeman*, 114 Fed. Appx. at 534-35; Petition Appx. B at pp. 11b-12b.

As to the claims against Thaxton and Kwascha, the Fourth Circuit concluded that the tortious interference with contract claim did not state a claim upon which relief could be granted under LMRA Section 301. *Freeman*, 114

[1] Freeman does not mention either the "bad faith discharge" claim or the claim for alleged violation of the North Carolina Constitution in his Petition and does not assert that the Fourth Circuit erred in affirming the dismissal of these claims.

Fed. Appx. at 535 (following *International Union, United Mine Workers of Am. v. Covenant Coal Corp.*, 977 F.2d 895, 897 (4th Cir. 1992)); Petition Appx. B at pp. 12b-13b. Finally, the Fourth Circuit concluded that Freeman's claim for unfair and deceptive trade practices against Thaxton and Kwascha did not state a valid claim under North Carolina law. *Freeman*, 114 Fed. Appx. at 535; Petition Appx. B at pp. 13b-14b.

The Fourth Circuit, in reliance on well-established precedent from this Court, the Fourth Circuit and other federal Courts of Appeals, affirmed the decision of the District Court in all respects. The Fourth Circuit subsequently denied Freeman's petitions for rehearing and for rehearing *en banc*. *See* Petition Appx. C.

REASONS FOR DENYING THE PETITION

The decision of the Fourth Circuit does not conflict with a decision of this Court or any federal Court of Appeals. In rendering its decision in this case, the Fourth Circuit relied upon and applied clear, well-established and unquestioned Fourth Circuit precedent as well as well-established precedent from this Court and from other federal Courts of Appeals. In short, there is no compelling reason for this Court to review the Fourth Circuit's decision.

I. THE DECISION OF THE FOURTH CIRCUIT DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT.

The decision of the Fourth Circuit does not conflict with any decision of this Court. There are three decisions

of this Court that are explicitly or implicitly implicated in Freeman's Petition: *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 107 S.Ct. 2425 (1987); *DelCostello v. Int'l Bhd. of Teamsters*, 462 U.S. 151, 103 S.Ct. 2281 (1983); and *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 105 S.Ct. 1904 (1985). As discussed in detail below, the Fourth Circuit's decision in this case does not conflict in any way with any of these decisions.

A. The Decision Of The Fourth Circuit Does Not Conflict With This Court's Decision In *Caterpillar, Inc.*

Freeman specifically asserts that the Fourth Circuit's decision conflicts with this Court's decision in *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 107 S.Ct. 2425 (1987). *See* Petition pp. 13-15. However, Freeman does not discuss or analyze the facts or holding of *Caterpillar, Inc.* or set forth any argument regarding the alleged conflict. Rather, the Petition states simply that claims based on an "independent" agreement are not preempted by LMRA Section 301.

In *Caterpillar, Inc.*, the plaintiffs alleged that while they were management employees and, therefore, not union members or subject to any collective bargaining agreement, Caterpillar entered into individual employment agreements with them. *See Caterpillar, Inc.*, 482 U.S. at 388-89, 107 S.Ct. at 2427-28. After they were demoted to positions within the bargaining unit and then laid off, the plaintiffs brought suit in California state court for breach of their individual employment agreements. *Id.* at 390, 107 S.Ct. at 2428. Caterpillar removed the action to federal court asserting complete preemption by LMRA Section 301. *Id.* This Court held that a claim for breach of an individual employment agreement, which was brought

by an employee who was not subject to any collective bargaining agreement at the time the individual agreement was executed, and the resolution of which was not substantially dependent on analysis of a collective bargaining agreement, was not preempted by LMRA Section 301. *Id.* at 394-98, 107 S.Ct. at 2430-33.

In the instant case, unlike the situation in *Caterpillar, Inc.*, Freeman was, at all times, a member of the Union and subject to the CBA between the Union and Duke. The Grievance Resolution and Amendment were entered into by Duke, Freeman and the Union to resolve a grievance brought by the Union on Freeman's behalf pursuant to the CBA. As distinguished from *Caterpillar, Inc.*, the Grievance Resolution and Amendment derive their very existence from the CBA.

In its decision, the Fourth Circuit squarely addressed this issue and distinguished *Caterpillar, Inc.* as follows:

> Although disputes arising over independent employment contracts unrelated to a CBA are not preempted by § 301 of the LMRA, *see Caterpillar Inc. v. Williams,* 482 U.S. 386, 394-95, 107 S.Ct. 2425, 2430-31, 96 L.Ed. 2d, 2430-31 (1987), the Grievance Resolution and the Amendment are not independent of the CBA. The employees in *Caterpillar* had entered separate management contracts and only later became subject to a CBA when they were demoted. Their state law action was based on the management contracts, not anything derivative of the CBA, and thus was not preempted by the LMRA. *Id.* at 395 & n. 9, 107 S.Ct. at 2425. The same cannot be said in the instant case, as the Grievance Resolution and Amendment derive their "entire vitality and legitimacy" from the CBA. *Davis,* 110 F.3d at 248.

Freeman, 114 Fed. Appx. at 531-532; Petition Appx. B at p. 7b. Freeman offers no argument on how the Fourth Circuit allegedly erred when it discussed and distinguished *Caterpillar, Inc.* This Court's decision in *Caterpillar, Inc.* is distinguishable and the Fourth Circuit's decision does not conflict with *Caterpillar, Inc.* in any way.

B. The Decision Of The Fourth Circuit Does Not Conflict With This Court's Decision In *DelCostello*.

Freeman's Petition could be construed to suggest that the Fourth Circuit's decision conflicts with this Court's opinion in *DelCostello* due to application of the six-month statute of limitations. *See* Petition p. 15. It is well established that, where a union has agreed to waive its right to grieve or otherwise challenge a discharge under a labor contract, the waiver acts as a final resolution of the matter. *See Bowen v. United States Postal Service*, 459 U.S. 212, 226, 103 S.Ct. 588, 596 (1983). This Court, however, has "recognized that this rule works an unacceptable injustice when the union representing the employee in the grievance/arbitration procedure ... breach[es] its duty of fair representation." *DelCostello*, 462 U.S. at 164, 103 S.Ct. at 2290 (citations omitted). As a result, this Court recognized "hybrid" LMRA Section 301 claims wherein "an employee may bring suit against both the employer and the union, notwithstanding the outcome or finality of the grievance or arbitration proceeding." *Id.* at 165, 103 S.Ct. at 2291. Such "hybrid" LMRA Section 301 claims borrow the six-month statute of limitations found in Section 10(b) of the NLRA, 29 U.S.C. § 160(b). *Id.* at 171, 103 S.Ct. at 2294.

The Fourth Circuit determined correctly that, due to the waiver of the grievance provisions of the CBA in the Grievance Resolution and Amendment, any LMRA Section 301 claim was governed by the six-month statute of limitations for hybrid LMRA Section 301 claims. *Freeman*, 114 Fed. Appx. at 533-34 (citing *DelCostello*, 462 U.S. at 171, 103 S.Ct. at 2294); Petition Appx. B at pp. 10b-11b. The Fourth Circuit's application of *DelCostello* in this case was correct and not in conflict with any decision of this Court.

C. The Decision Of The Fourth Circuit Does Not Conflict With This Court's Decision In *Allis-Chalmers, Corp.*

Freeman asserts that the Fourth Circuit's decision below was inconsistent with this Court's decision in *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 211, 105 S.Ct. 1904, 1911 (1985). *See* Petition p. 15. Freeman argues that, because the Grievance Resolution and Amendment waived his access to the grievance provisions of the CBA, those agreements should not be considered labor contracts within the meaning of LMRA Section 301. *See* Petition p. 15. Freeman suggests that *Allis-Chalmers Corp.* stands for the proposition that in order to be a labor contract, an agreement must allow access to arbitration. *See id.*

Allis-Chalmers Corp. does not state or imply that an agreement must contain an arbitration provision in order to be a labor contract within the meaning of LMRA Section 301. To the contrary, *Allis-Chalmers Corp.* specifically states that "Section 301 on its face says nothing about the substance of what private parties may agree to in a labor contract." *Allis-Chalmers Corp.*, 471 U.S. at 211-12, 105 S.Ct. at 1911-12.

Contrary to Freeman's assertion, the Union's waiver of the grievance provisions of the CBA in the Grievance Resolution and Amendment does not render those agreements mere state law contracts. Rather, the waiver rendered Duke's decision to terminate Freeman a "final" decision for purposes of the CBA. *See Bowen*, 459 U.S. at 226, 103 S.Ct. at 596. Accordingly, Freeman's remedy was a hybrid LMRA Section 301 action, as discussed by this Court in *DelCostello*, 462 U.S. at 165, 103 S.Ct. 2291, *Vaca v. Sipes*, 386 U.S. 171, 87 S.Ct. 903 (1967), and other cases.

The Fourth Circuit's decision does not conflict in any way with this Court's decision in *Allis-Chalmers Corp.* or any other case.

II. THERE IS NO CIRCUIT SPLIT ON THE QUESTIONS PRESENTED.

The decision of the Fourth Circuit below does not conflict with the decisions of any other Court of Appeals on the issues presented.

There is no split among the Courts of Appeals regarding the fact that a settlement agreement entered to resolve a grievance initiated by a union pursuant to the terms of a collective bargaining agreement is a labor "contract" within the meaning of LMRA Section 301. The various Courts of Appeals agree on this point, even though they use slightly different labels to describe the agreements at issue.

In its decision, the Fourth Circuit characterized the Grievance Resolution and Amendment as labor contracts within the meaning of LMRA Section 301 because they

"derive[d] their 'entire vitality and legitimacy' from the CBA." *Freeman*, 114 Fed. Appx. at 531-32 (quoting *Davis*, 110 F.3d at 248); Petition Appx. B at pp. 6b-7b. The Sixth Circuit and the Third Circuit have reached similar conclusions with regard to grievance settlement agreements. *See Jones v. General Motors Corp.*, 939 F.2d 380, 382-83 (6th Cir. 1991) (settlement agreement arrived at by virtue of the grievance process established by a collective bargaining agreement was a labor contract within the meaning of Section 301 of LMRA); *United Mine Workers of Am. v. Barnes & Tucker Co.*, 561 F.2d 1093, 1096-98 (3rd Cir. 1977) (same); *see also Duerr v. 3M*, 101 F. Supp. 2d 1057, 1060-61 (N.D. Ill. 2000) (same); *Amalgamated Meat Cutters and Butcher Workmen of N. Am., Local 195, AFL-CIO v. M. Feder & Co.*, 234 F. Supp. 564, 548 (E.D. Pa. 1964) (same).

Other Courts of Appeals, including the Fifth, Sixth, Seventh, Eighth and District of Columbia Circuits, have uniformly held that settlement agreements arising out of grievances, which are typically characterized as "last chance agreements," are labor contracts within the meaning of LMRA Section 301. *See Int'l Union of Operating Eng'rs v. Cooper Natural*, 163 F.3d 916, 919 (5th Cir.), *cert. denied*, 528 U.S. 812, 120 S.Ct. 45 (1999) (last chance agreement is labor contract for purposes of Section 301 of LMRA); *Coca-Cola Bottling Co. of St. Louis v. Teamsters Local Union No. 688*, 959 F.2d 1438 (8th Cir. 1992) (same); *United States Dep't of the Air Force v. Fed. Labor Relations Auth.*, 949 F.2d 475, 478 (D.C. Cir. 1991) (same); *Tootsie Roll Indus., Inc. v. Local Union No. 1, Bakery, Confectionary and Tobacco Workers' Int'l Union*, 832 F.2d 81, 82 (7th Cir. 1987) (same); *Bakers Union Factory No. 326 v. ITT Cont'l Baking Co., Inc.*, 749 F.2d 350, 354 (6th Cir. 1984)

(same); *see also Cotter v. DaimlerChrysler Corp.*, 87 F. Supp. 2d 746, 757 (E.D. Mich. 2000) (same).

The Fourth Circuit's decision is wholly consistent with the vast body of well-established precedent that a settlement agreement entered into to resolve a grievance initiated by a union pursuant to the terms of a collective bargaining agreement is a labor contract within the meaning of LMRA Section 301. Further, there is no split among the Courts of Appeals regarding any other question presented in the instant action.

III. THIS CASE DOES NOT PRESENT ANY QUESTION OF EXCEPTIONAL IMPORTANCE TO LABOR LAW JURISPRUDENCE WHICH SHOULD BE DECIDED BY THIS COURT.

In rendering its decision, the Fourth Circuit applied well-established precedent from this Court, the Fourth Circuit and the other Courts of Appeals.

As discussed in Section II, *supra*, it is well established in the Fourth Circuit and the other Courts of Appeals that agreements such as the Grievance Resolution and the Amendment are labor contracts within the meaning of LMRA Section 301.

The case law from this Court firmly establishes that a state law claim for breach of a labor contract and any other claim the resolution of which requires the interpretation of a labor contract are completely preempted by LMRA Section 301. *See Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 108 S.Ct. 1877 (1988); *Allis-Chalmers Corp.*, 471 U.S. at 220, 105 S.Ct. at 1915; *Caterpillar, Inc.*, 482 U.S. at 393, 107 S.Ct. at 2430; *Franchise Tax Bd. v.*

Constr. Laborers Vacation Trust, 463 U.S. 1, 24, 103 S.Ct. 2841, 2854 (1983); *Avco Corp. v. Aero Lodge No. 735, Int'l Ass'n Of Machinists & Aerospace Workers*, 390 U.S. 557, 88 S.Ct. 1235 (1968). Further, it is firmly established that state law claims that are completely preempted by LMRA Section 301 "must either be treated as a § 301 claim . . . or dismissed as preempted by federal labor-contract law." *Allis-Chalmers Corp.*, 471 U.S. at 220, 105 S.Ct. at 1915.

It is well-established precedent in this Court that, where a decision is "final" under a labor contract, either by operation of the grievance procedure or by waiver, a plaintiff may only pursue a "hybrid" LMRA Section 301 claim. *See DelCostello*, 462 U.S. at 165, 103 S.Ct. at 2291; *Vaca*, 386 U.S. 171, 87 S.Ct. 903. Further, it is beyond question that "hybrid" LMRA Section 301 claims are subject to the six-month statute of limitations found in Section 10(b) of the NLRA, 29 U.S.C. § 160(b), and that claims bought after the expiration of this statute of limitations fail as matter of law. *DelCostello*, 462 U.S. at 171, 103 S.Ct. at 2294.

Fourth Circuit and other Courts of Appeals have repeatedly held that a claim against a manager, supervisor or other third-party for tortious interference with a labor contract is preempted by LMRA Section 301. *See Covenant Coal Corp.*, 977 F.2d at 897 (claim for tortious interference with labor contract preempted by LMRA Section 301); *Steinbach v. Dillon Cos.*, 253 F.3d 538, 540 (10th Cir. 2001) (same); *Kimbro v. Pepsico, Inc.*, 215 F.3d 723, 727 (7th Cir. 2000) (same); *Hillard v. Dobelman*, 774 F.2d 886, 887 (8th Cir. 1985) (same).

Freeman specifically argues in his Petition that the question of whether the Grievance Resolution and the

Amendment are "riders" to the CBA, "last chance agreements" or mere state law contracts is a question of exceptional importance to labor law jurisprudence that should be decided by this Court. *See* Petition pp. 15-16. As discussed above, however, it is firmly established in the Courts of Appeals that a settlement agreement entered into to resolve a grievance initiated by a union pursuant to the terms of a collective bargaining agreement is a labor contract within the meaning of LMRA Section 301, regardless of the semantics of labeling such an agreement a "rider to the CBA" or a "last chance agreement." *See* Section II, *supra*. This issue is well settled in labor law jurisprudence and need not be considered by this Court.

The case at bar presents no new issues. The issues raised in the Petition are firmly established in labor law jurisprudence, through the decisions of this Court and the Courts of Appeals, and should not be disturbed. There is simply no unsettled question of exceptional importance to labor law jurisprudence presented in this case.

IV. THERE IS NO INTERNAL CONFLICT WITH THE CASE LAW OF THE FOURTH CIRCUIT ON THE QUESTIONS PRESENTED.

In finding that Freeman's claim against Thaxton and Kwascha for tortious interference with contract was preempted, the Fourth Circuit applied "controlling and unquestioned circuit precedent." *Freeman*, 114 Fed. Appx. at 535 (citing *Covenant Coal Corp.*, 977 F.2d at 897); Petition Appx. B at pp. 12b-13b. Nevertheless, Freeman asserts as a basis for review by this Court that the Fourth Circuit's decision below conflicted with the Fourth Circuit's previous opinion in *Jackson v. Kimel*, 922 F.2d 1318 (4th Cir. 1993). *See* Petition pp. 16-19.

The Fourth Circuit's decision in *Jackson* is distinguishable and inapplicable in this case. The issue in *Jackson* was whether a state law claim for intentional infliction of emotional distress against a former supervisor was preempted by LMRA Section 301. The Fourth Circuit held that such a claim was not preempted because the supervisor's conduct "if it occurred as alleged, [was] wrongful regardless of whether it was authorized by the collective bargaining agreement." *Jackson*, 992 F.2d at 1326. Interpretation of the relevant labor contract was not necessary to establish any element of the plaintiff's claim.

Unlike *Jackson*, the claim at issue in this case was a purported state law claim for tortious interference with various labor contracts, including the CBA, the Grievance Resolution and the Amendment. The Fourth Circuit explicitly held in *Covenant Coal Corp.*, 977 F.2d at 897, that a state law claim for tortious interference with contract is preempted by LMRA Section 301 where the contract at issue was a labor contract. *See also Steinbach*, 253 F.3d at 540 (claim for tortious interference with labor contract preempted by LMRA Section 301); *Kimbro*, 215 F.3d at 727(same); *Hillard*, 774 F.2d at 887 (same).

In his Petition, Freeman quotes extensively from the *concurring* opinion in *Jackson* in support of his position. *See* Petition pp. 17-19 (quoting *Jackson*, 992 F.2d at 1327-28 (Phillips, J., concurring)). However, the Fourth Circuit has specifically rejected the reasoning of this concurrence in *Jackson* as inconsistent with its prior decision in *Covenant Coal Corp. See Shiflett v. I.T.O. Corp.*, No. 99-1379, 2000 U.S. App. LEXIS 263 (4th Cir. Jan. 20, 2000).

Based on its decision in *Covenant Coal Corp.*, the Fourth Circuit determined that it was "bound . . . by prior

controlling and unquestioned circuit precedent" and, therefore, held that Freeman's claim for tortious interference with contract was preempted and should be dismissed. *Freeman*, 114 Fed. Appx. at 535 (citing *Covenant Coal Corp.*, 977 F.2d at 897); Petition Appx. B at pp. 12b-13b. This decision was not in conflict with *Jackson* or any other decision by the Fourth Circuit.

V. THERE IS NO COMPELLING REASON FOR THIS COURT TO INVOKE ITS DISCRETIONARY AUTHORITY TO REVIEW THE FOURTH CIRCUIT'S DECISION.

In his Petition, Freeman argues that he will be left without a remedy if the Fourth Circuit's decision is not reviewed and reversed by this Court and, therefore, this Court should grant certiorari to correct this "unjust and harsh" result. (Petition pp. 15, 19-21). Freeman had remedies available to him but he did not pursue them.

For example, Freeman could have asserted a hybrid LMRA Section 301 claim against Duke and the Union at any time prior to the expiration of the six-month statute of limitations in January of 2000; however, he did not do so. Likewise, Freeman could have filed an unfair labor practice charge with the National Labor Relations Board regarding any alleged conduct by Thaxton and Kwascha; however, he did not do so.[2] *See Covenant Coal Corp.*, 977 F.2d at 899-900 (noting availability of unfair labor practice

[2] Both a hybrid LMRA Section 301 action and an unfair labor practice charge are subject to the six-month statute of limitations contained in 29 U.S.C. § 160(b). *See DelCostello*, 462 U.S. at 171, 103 S.Ct. at 2294.

charge to redress alleged interference with labor contract by third-party who was not a signatory of the labor contract). Freeman's failure to pursue the remedies available to him is not a compelling reason for this Court to invoke its discretionary authority to review the Fourth Circuit's decision.

Further, the Fourth Circuit correctly applied North Carolina law in concluding that Freeman's claim for unfair and deceptive trade practices failed to state a claim upon which relief could be granted. Any alleged error in the application of North Carolina law in this case fails to provide a compelling reason for this Court to invoke its discretionary authority to review the Fourth Circuit's decision.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Court deny the Petition for Writ of Certiorari.

Respectfully submitted, this the 28th day of February, 2005.

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